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Goodrich. 27 Yale Law Journal

Holfield: Liability of Stockholders in Foreign Corps.
10 & 9 Col. L. Rev.

Abbott: 23 H. L. R. 37

Trusts of Personal Prop & Conflict of Laws
19 Col. L. Rev. 488



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A
SHORTER SELECTION
OF CASES ON
THE CONFLICT OF LAWS

BY
JOSEPH HENRY BEALE, JR.
BUSSEY PROFESSOR OF LAW IN HARVARD UNIVERSITY

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A SHORTER SELECTION OF
CASES ON THE CONFLICT OF LAWS.

PART I.
JURISDICTION.

CHAPTER I.
LAW.

MCDONALD *v.* MALLORY.

COURT OF APPEALS, NEW YORK. 1879.

[*Reported 77 N. Y. 546.*]

RAPALLO, J.¹ For the purposes of this appeal the wrongful act or neglect causing the death of the plaintiff's intestate must be treated as having been committed upon the high seas. The complaint does not specifically allege that the disaster was caused by the unlawful or negligent lading of the petroleum on board of the vessel in the port of New York, and consequently the question whether that fact, if alleged, would establish that the wrong complained of was committed within the territorial bounds of this State, need not be considered.

We shall therefore come directly to the principal point argued, which is, whether under the statute of this State, which gives a right of action for causing death by wrongful act or neglect, an action can be maintained for thus causing a death on the high seas, on board of a vessel hailing from and registered in a port within this State and owned by citizens thereof; the person whose death was so caused

¹ The opinion only is given ; it sufficiently states the case. — Ed.

being also a citizen of this State, the vessel being at the time employed by the owners in their own business, and their negligence being alleged to have caused the death.

It is settled by the adjudications of our own courts that the right of action for causing death by negligence exists only by virtue of the statute, and that where the wrong is committed within a foreign State or country, no action therefor can be maintained here, at least without proof of the existence of a similar statute in the place where the wrong was committed. (*Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Crowley v. Panama R. R. Co.*, 30 Barb. 99; *Beach v. Bay State Steamboat Co.*, 30 id. 433; *Vandeventer v. N. Y. and New Haven R. R. Co.*, 27 id. 244.) These decisions rest upon the plain ground that our statute can have no operation within a foreign jurisdiction, and that with respect to positive statute law it cannot be presumed that the laws of other States or countries are similar to our own. (Opinion of Denio, J., 23 N. Y. 467, 468, 471.) The liability of a person for his acts depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one State or country for a personal injury may be enforced in another to which the parties may remove or where they be found, yet the right or liability must exist under the laws of the place where the act was done. Actions for injuries to the person committed abroad are sustained without proof in the first instance of the *lex loci*, upon the presumption that the right to compensation for such injuries is recognized by the laws of all countries. But this presumption cannot apply where the wrong complained of is not one of those thus universally recognized as a ground of action, but is one for which redress is given only by statute.

Keeping these principles in view it is clear that in order to maintain this action it is necessary to establish that the statute law in question was operative on board of the vessel upon which the injury was committed. In all the cases which have been decided, the place of the injury was actually within the limits of a foreign territory, subject to its own laws, and where there could be no claim that the laws of this State or country were operative. In the present case the *locus in quo* was not within the actual territorial limits of any State or nation, nor was it subject to the laws of any government, unless the rule which exists from necessity is applied, that every vessel on the high seas is constructively a part of the territory of the nation to which she belongs, and its laws are operative on board of her. In this respect the case is new.

There can be no question that if this case were one arising under the laws of the United States the rule referred to would apply, and acts done on board of her while on the high seas would be governed by those laws. The question now presented is whether in respect to matters not committed by the Constitution exclusively to the Federal government nor legislated upon by Congress, but regulated entirely

by State laws, the State to which the vessel belongs can be regarded as the sovereignty whose laws follow her until she comes within the jurisdiction of some other government.

This precise question arose in the case of *Kelly v. Crapo* (45 N. Y. 86; and 16 Wall. 610), though in a different form. The question there was whether a vessel upon the high seas was subject to the insolvent laws of the State of Massachusetts, to which State the vessel belonged, that is, where she was registered and her owner resided, so that by operation of those laws, and without any act of the owner, the title to the vessel could be transferred while she was at sea by a proceeding *in invitum*, to an official assignee, and his title thus acquired would take precedence of an attachment levied upon her in the State of New York after she had come within this State.

It was conceded in that case, in this court as well as in the Supreme Court of the United States, that unless the vessel was actually or constructively within the jurisdiction of the State of Massachusetts her insolvent law could not operate upon her so as to defeat a title acquired under the laws of the State within whose actual territorial jurisdiction she afterwards came. (16 Wall. 622.) But in support of the title of the assignee in insolvency it was urged that the rule before referred to applied to her, and that while at sea she was constructively a part of the territory of the State of Massachusetts and subject to her laws.

This court held that the rule invoked was not applicable to a State, and State laws, but that the jurisdiction referred to was vested in the government of the United States, and that the national territory and its laws only were extended by legal fiction to vessels at sea.

This decision was reversed by the Supreme Court of the United States (*Crapo v. Kelly*, 16 Wall. 610), and as we understand the prevailing opinion in that court, it holds that the relations of a State to the Union do not affect its *status* as a sovereign, except with respect to those powers and attributes of sovereignty which have by the Constitution been transferred to the government of the United States, and that in all other respects it stands as if it were an independent sovereign State, unconnected with the other States of the Union. Upon this principle it was held that the vessel while at sea was constructively part of the territory of the State of Massachusetts and subject to its laws. (16 Wall. 628, 624, 631-632.) It is difficult to conceive any other principle upon which that conclusion could have been reached.

In respect to crimes committed on the high seas, the power to provide for their punishment has been delegated to the Federal government, and for that reason State laws cannot be applicable to them; but I cannot escape the conclusion that under the principle of the case of *Crapo v. Kelly* civil rights of action, for matters occurring at sea on board of a vessel belonging to one of the States of the Union must depend upon the laws of that State, unless they arise out of some matter over which jurisdiction has been vested in and exercised by the government of the United States, or over which the State has

transferred its rights of sovereignty to the United States ; and that to this extent the vessel must be regarded as part of the territory of the State, while in respect to her relations with foreign governments, crimes committed on board of her, and all other matters over which jurisdiction is vested in the Federal government, she must be regarded as part of the territory of the United States and subject to the laws thereof.

The facts alleged in the complaint, and admitted by the demurrer, present a strong case for the application of the rule that the laws of the State to which the vessel belongs follow her until she comes within some other jurisdiction. The defendants, by whom the wrong is alleged to have been committed, were, at all times up to its final consummation by the death of the plaintiff's intestate, citizens and residents of this State, and subject to its laws, and the deceased was also a citizen of this State. The death was caused either by the illegal and negligent act done in this State of lading the dangerous and prohibited article on board the vessel and sending the deceased to sea in her thus exposed, or by the negligence or wrongful acts of the defendants committed at sea through their agents. The complaint does not distinctly specify which, but it must have been one or the other. If the latter, then, at the place where the injury was consummated there was no law by which to determine whether or not it rendered the defendants liable to an action, unless the law of the State to which the vessel belonged followed her. In the present case the defendants were, at the time of the wrongful act or neglect, and of the injury, within this State and subject to its laws, and none of the objections, suggested in the various cases which have been cited, to subjecting them to liability under the statute, for acts done out of the territory of the State, can apply. There can be no double liability, as suggested by Denio, J., in 23 N. Y. 467, 471, for the *locus in quo* was not subject to the laws of any other country ; nor can it be said that the deceased or his representatives were under the protection of the laws of any other government, as is said in some of the other cases cited. It is a case where no confusion or injustice can result from the application of the principle declared by the Supreme Court, that the laws of the State as well as of the United States, enacted within their respective spheres, follow the vessel when on the high seas. In the opinion of the court at General Term in this case it is expressly conceded that both the laws of the State and the nation have dominion on a vessel on the high seas, but the demurrer was sustained on the ground that this right of jurisdiction has not been exercised by the State of New York, and its statutes are restricted in their operation to the actual territorial bounds of the State.

No such restriction is contained in the statute now under consideration. Its language is broad and general and by its terms it operates in all places. Its operation on cases arising in other States and countries has not been denied by reason of anything contained in

the act itself or in any other legislative act, but on general principles of law.

But the court rests its conclusion upon the act of the Legislature of this State which defines its boundaries and declares that the sovereignty and jurisdiction of this State extends to all the places within the boundaries so declared (1 R. S. 62, 65), and it construes that act as a renunciation or abrogation of any effect which might on general principles of law be given to its statutes on board of vessels on the high seas.

We are unable to concur in this view. The act referred to was intended to define simply the actual territorial bounds of the State, and the declaration that its sovereignty and jurisdiction should extend to all places within those bounds was not intended to nor could it operate as a restriction upon subsequent legislation, nor had it any reference to such a question as that now before us. Whatever operation our laws may have on board of vessels at sea depends upon general principles, and there is nothing in the legislation of our State which places it in this respect on a different footing from any other. It is not claimed that the sovereignty and jurisdiction of this State extend to its vessels when at sea, as they do to places within its boundaries, for all purposes, such as service of process, the execution of judgments and the like, but only that when acts done at sea become the subject of adjudication here, the rights and liabilities of parties may in some cases be determined with reference to our statutes. There is nothing inconsistent with this in the act referred to, or in the assertion of sovereignty and jurisdiction for all purposes over places within the bounds of the State.

The decision of this court in *Kelly v. Crapo* is referred to as the highest evidence that this State never intended that its laws should extend to vessels on the high seas. That decision recognized the general principle that the laws of a nation do so extend, but was based upon the theory that the relation of the State to the Union was such that this attribute of sovereignty had become merged in the powers granted to the general government. But the judgment of the Supreme Court of the United States having established the contrary view, and that in matters not the subject of Federal legislation, the laws of the State follow the vessel, thus making the laws of the State and of the United States, in their respective spheres, together constitute the law of the nation to which the vessel belongs, we adopt that decision as the judgment of the tribunal to whom the ultimate determination of questions of that nature properly belongs.

There is nothing in the nature of this action which renders it exclusively the subject of Federal cognizance. The jurisdiction of the States and of the United States in the matter of personal torts committed at sea, such as assaults by a master on his crew, injuries to passengers, and the like, are concurrent, though remedies by proceedings *in rem* can be administered only by the Courts of Admiralty of the

United States. The field of legislation in respect to cases like the present one has not been occupied by the general government and is therefore open to the States. (*Steamboat Co. v. Chase*, 16 Wall. 522, 530, 533.) Indeed the United States Court of Admiralty would have no jurisdiction in such a case (*Steamboat Co. v. Chase*, 16 Wall. 522, 530, 533; *Sherlock v. Allen*, 93 U. S. 99), and there is no greater objection to extending the operation of a statute of this description to a vessel at sea than there was to giving similar operation to a State insolvent law.

DOBREE v. NAPIER.

COURT OF COMMON PLEAS. 1836.

[*Reported 2 Bingham's New Cases*, 781].

TINDAL, C. J.¹ The plaintiffs declare in this action against the two defendants for seizing and taking a steam vessel of the plaintiffs, and converting the same to their use.

The defendants sever in their pleading, but each puts upon the record substantially the same justification, to which the answers given by the replication are the same, and the same questions of law are raised thereon.

It will be sufficient, therefore, to consider the case as it is raised upon the pleadings with respect to the first-named defendant, Charles Napier.

The third special plea of the defendant Charles Napier alleges, that as a servant of the Queen of Portugal, and by her command, he seized and took the steam vessel of the plaintiffs as lawful prize, and that such proceedings were thereupon had, according to the laws of Portugal, in a court of law in the kingdom of Portugal of competent jurisdiction in that behalf, that afterwards, in and by the said court, the said steam vessel was adjudged to have been justly and lawfully taken, and was then in due course and form of law condemned as lawful prize, and as forfeited to the Queen of Portugal. In answer to this plea, the plaintiff in his replication alleges certain facts, which bring the service of the defendant Charles Napier under the Queen of Portugal, upon the occasion in question, within the restrictions of the statute 59 G. 3. c. 69. s. 2., generally known by the name of the Foreign Enlistment Act; and to this replication the defendant demurred.

We think it is perfectly clear, that, except for the facts introduced by the replication, the plea, standing alone and unanswered, would be a conclusive bar to the plaintiff's right of action. The sentence of a foreign court of competent jurisdiction, condemning a neutral vessel taken in war, as prize, is binding and conclusive on all the world; and

¹ The opinion only is given; it sufficiently states the case. Part of the opinion, involving a different question, is omitted. — *Et*

no English court of law can call in question the propriety, or the grounds, of such condemnation. It is sufficient to refer to the case of *Hughes v. Cornelius and others*, Sir T. Raym. 473, as a decisive authority on that point. It follows that after the sentence of the Court of Lisbon, it cannot be controverted in this, or any other English court, that the steam vessel was rightly taken by the Queen of Portugal as prize, and that all the property of the plaintiffs therein became, by such capture and condemnation, forfeited to the Queen, and vested in her.

But the plaintiffs contend that the replication, by the facts therein disclosed, shows that the service of the defendant Charles Napier under the Queen of Portugal, by virtue of which service alone he justifies the seizing of the steam vessel, is made illegal by an English statute, viz. the statute 59 G. 3. c. 69., and that such illegality of the service prevents him from making any justification under the Queen of Portugal, and renders him liable to all the damages which the plaintiffs have sustained by reason of the seizure. And whether the conclusion which the plaintiffs draw from these premises is the just conclusion or not, is the question between these parties. The seizure by the Queen of Portugal must be admitted to be justifiable; no objection can be taken against the forfeiture of the property in this vessel to the Queen, under the sentence of condemnation. The plaintiffs, therefore, in contemplation of law, have sustained no legal injury by reason of the seizure. Again no one can dispute the right of the Queen of Portugal, to appoint in her own dominions, the defendant or any other person she may think proper to select, as her officer or servant, to seize a vessel which is afterwards condemned as a prize; or can deny, that the relation of lord and servant, *de facto*, subsists between the Queen and the defendant Napier. For the Queen of Portugal cannot be bound to take any notice of, much less owe any obedience to, the municipal laws of this country. Still, however, notwithstanding the loss by seizure is such, as that no court of law can consider it an injury, or give any redress for it; and that the service and employment of the defendant is a service and employment *de facto*; the plaintiffs contend they can make the servant responsible for the whole loss, only by reason of his being obnoxious to punishment in this country, for having engaged in such service. No case whatever has been cited which goes the length of this proposition; the authorities referred to establishing only, that where an act prohibited by the law of this country has been done, the doer of such illegal act cannot claim the assistance of a court of law in this country to enforce such act, or any benefit to be derived from it, or any contract founded upon it. To the full extent of these authorities, we entirely accede; but we cannot consider the law to be, that where the act of the principal is lawful in the country where it is done, and the authority under which such act is done is complete, binding, and unquestionable there, the servant who does the act can be made responsible in the courts of this country for the consequence of such act, to the same

extent as if it were originally unlawful, merely by reason of a personal disability imposed by the law of this country upon him, for contracting such engagement. Such a construction would effect an unreasonable alteration in the situation and rights of the plaintiffs and the defendant. The plaintiffs would, without any merit on their part, recover against the servant the value of the property to which they had lost all claim and title by law against the principal; and the defendant, instead of the measure of punishment intended to be inflicted by the statute for the transgression of the law, might be made liable to damages of an incalculable amount. Again, the only ground upon which the authority of the servant is traversable at all in an action of trespass, is no more than this; to protect the person or property of a party from the officious and wanton interference of a stranger, where the principal might have been willing to waive his rights. It is obvious that the full benefit of this principle is secured to the plaintiffs by allowing a traverse of the authority *de facto*, without permitting them to impeach it by a legal objection to its validity, in another and foreign country. And we think there is no material difference between the third and the first and second special pleas on this record. For as we hold that the authority of the Queen of Portugal to be a justification of the seizure "as prize," there is as little doubt but that she might direct a neutral vessel to be seized when in the act of breaking a blockade by her established, which is the substance of the first special plea, or of supplying warlike stores to her enemies, which is the substance of the second. We therefore give judgment on the first three special pleas, for the defendants.

Judgment for Defendants.

BLANKARD v. GALDY.

KING'S BENCH. 1698.

[*Reported 2 Salkeld, 411.*]

IN debt on a bond, the defendant prayed oyer of the condition, and pleaded the statute E. 6. against buying offices concerning the administration of justice; and averred, That this bond was given for the purchase of the office of provost-marshal in Jamaica, and that it concerned the administration of justice, and that Jamaica is part of the revenue and possessions of the Crown of England: The plaintiff replied,

that Jamaica is an island beyond the seas, which was conquered from the Indians and Spaniards in Queen Elizabeth's time, and the inhabitants are governed by their own laws, and not by the laws of England: The defendant rejoined, That before such conquest they were governed by their own laws; but since that, by the laws of England: Shower argued for the plaintiff, that, on a judgment in Jamaica, no writ of error lies here, but only an appeal to the Council; and as they are not represented in our Parliament, so they are not bound by our statutes, unless specially named. *Vide* And. 115. Pemberton *contra* argued, that by the conquest of a nation, its liberties, rights, and properties are quite lost; that by consequence their laws are lost too, for the law is but the rule and guard of the other; those that conquer, cannot by their victory lose their laws, and become subject to others. *Vide* Vaugh. 405. That error lies here upon a judgment in Jamaica, which could not be if they were not under the same law. *Et per* HOLT, C. J. & Cur.,

First, in case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; so it seemed to be agreed.

Secondly, Jamaica being conquered, and not pleaded to be parcel of the kingdom of England, but part of the possessions and revenue of the Crown of England, the laws of England did not take place there, until declared so by the conqueror or his successors. The Isle of Man and Ireland are part of the possessions of the Crown of England; yet retain their ancient laws: That in Davis 86. it is not pretended, that the custom of tanistry was determined by the conquest of Ireland, but by the new settlement made there after the conquest: That it was impossible the laws of this nation, by mere conquest, without more, should take place in a conquered country; because, for a time, there must want officers, without which our laws can have no force: That if our law did take place, yet they in Jamaica having power to make new laws, our general laws may be altered by theirs in particulars; also they held, that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.

*Judgment pro quer.*¹

¹ Another report of the same case may be found in 4 Mod. 222. In that case the Court is reported to have said: "And therefore it was held, that Jamaica was not governed by the laws of England after the conquest thereof, till new laws were made: for they had neither sheriff or counties; they were only an assembly of people which are not bound by our laws, unless particularly mentioned. In Barbadoes all freeholds are subject to debts, and are esteemed as chattels till the creditors are satisfied, and then the lands descend to an heir; but the law is otherwise here; which shows that though that island is parcel of the possessions of England, yet it is not governed by the laws made here, but by their own particular laws and customs."

Acc. Earl Derby's Case, 2 And. 116; Mem- 2 P. Wms. 75. See *Cross v. Harrison*, 16 How. 164; *Airhart v. Massieu*, 98 U. S. 491. — Ed.

SWIFT v. TYSON.

SUPREME COURT OF THE UNITED STATES. 1842.

[Reported 16 *Peters' Reports*, 1.]MR. JUSTICE STORY delivered the opinion of the court.¹

This cause comes before us from the Circuit Court of the Southern District of New York, upon a certificate of division of the judges of that court.

The action was brought by the plaintiff, Swift, as endorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the first day of May, 1836, for the sum of one thousand five hundred and forty dollars, thirty cents, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton endorsed to the plaintiff. The bill was dishonored at maturity. . . .

In the present case, the plaintiff is a *bona fide* holder (without notice) for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles as by the express provisions of the thirty-fourth section of the Judiciary Act of 1789, ch. 20. And then it is further contended, that by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments. . . .

To say the least of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain that the Court of Errors have not pronounced any positive opinion upon it.

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the thirty-fourth section of the Judiciary Act of 1789, ch. 20, furnishes a rule

¹ Part of the opinion is omitted. — ED.

obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold, that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the

commercial world. Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtenebit.

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. . . .

WESTERN UNION TELEGRAPH CO. v. CALL
PUBLISHING CO.

SUPREME COURT OF THE UNITED STATES. 1901.

[*Reported 181 United States, 92.*]

THIS was an action commenced on April 29, 1891, in the District Court of Lancaster County, Nebraska, by the Call Publishing Company, to recover sums alleged to have been wrongfully charged and collected from it by the defendant, now plaintiff in error, for telegraphic services rendered. According to the petition the plaintiff had been engaged in publishing a daily newspaper in Lincoln, Nebraska, called *The Lincoln Daily Call*. The *Nebraska State Journal* was another newspaper published at the same time in the same city, by the State Journal Company. Each of these papers received Associated Press despatches over the lines of the defendant. The petition alleged:

"4th. That during all of said period the defendant wrongfully and unjustly discriminated in favor of the said State Journal Company and against this plaintiff, and gave to the State Journal Company an undue advantage, in this: that while the defendant demanded, charged, and collected of and from the plaintiff for the services aforesaid seventy-five dollars per month for such despatches, amounting to 1500 words or less daily, or at the rate of not less than five dollars per 100 words daily per month, it charged and collected from the said State Journal Company for the same, like, and contemporaneous services only the sum of \$1.50 per 100 words daily per month.

"Plaintiff alleges that the sum so demanded, charged, collected, and received by the said defendant for the services so rendered the plaintiff, as aforesaid, was excessive and unjust to the extent of the amount of the excess over the rate charged the said State Journal Company for the same services, which excess was three dollars and fifty cents per one hundred words daily per month, and to that extent it was an unjust and wrongful discrimination against the plaintiff and in favor of the State Journal Company.

"That plaintiff was at all times and is now compelled to pay said excessive charges to the defendant for said services or to do without the same; that plaintiff could not dispense with such despatches without very serious injury to its business."

The telegraph company's amended answer denied any unjust discrimination; denied that the sums charged to the plaintiff were unjust or excessive, and alleged that such sums were no more than a fair and reasonable charge and compensation therefor, and similar to charges made upon other persons and corporations at Lincoln and elsewhere for like services. The defendant further claimed that it was a corporation, engaged in interstate commerce; that it had accepted the provisions of the act of Congress entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal and other purposes," approved July 24, 1866; that it had constructed its lines under the authority of its charter and that act, and denied the jurisdiction of the courts of Nebraska over this controversy. A trial was had, resulting in a verdict and judgment for the plaintiff, which judgment was reversed by the Supreme Court of the State. 44 Neb. 326. A second trial in the District Court resulted in a verdict and judgment for the plaintiff, which was affirmed by the Supreme Court of the State (58 Neb. 192), and thereupon the telegraph company sued out this writ of error.

BREWER, J.¹ The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not at the time these services were rendered prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that therefore, there being no controlling statute or common law, the State court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal company. In the brief of counsel it is said: "The contention was consistently and continuously made upon the trial by the telegraph company that, as to the State law, it could not apply for the reasons already given, and that, in the absence of a statute by Congress declaring a rule as to interstate traffic by the telegraph company, such as was appealed to by the publishing company, there was no law upon the subject." The logical result of this contention is that persons dealing with common carriers engaged in interstate commerce and in respect to such commerce are absolutely at the mercy of the carriers. It is true counsel do not insist that the telegraph company or any other company engaged in interstate commerce may charge or contract for unreasonable rates, but they do not say that they may not, and if there be neither statute nor common law control-

¹ Part of the opinion, in which the charge of the court at the trial was given, is omitted. — ED.

ling the action of interstate carriers, there is nothing to limit their obligation in respect to the matter of reasonableness. We should be very loath to hold that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services; and if there be no law to restrain, the necessary result is that there is no limit to the charges they may make and enforce. . . . Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no federal common law, and that such has been the ruling of this court; there was no federal statute law at the time applicable to this case, and as the matter is interstate commerce, wholly removed from State jurisdiction, the conclusion is reached that there is no controlling law, and the question of rates is left entirely to the judgment or whim of the telegraph company.

This court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the States. It has also held that the inaction of Congress is indicative of its intention that such interstate commerce shall be free, and many cases are cited by counsel for the telegraph company in which these propositions have been announced. Reference is also made to opinions in which it has been stated that there is no federal common law different and distinct from the common law existing in the several States. Thus, in *Smith v. Alabama*, 124 U. S. 465, 478, it was said by Mr. Justice Matthews, speaking for the court:

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from

that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of that State," p. 478.

Properly understood, no exceptions can be taken to declarations of this kind. There is no body of federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

What is the common law? According to Kent: "The common law includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature." 1 Kent, 471. As Blackstone says: "Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom. This unwritten, or common, law, is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification." 1 Blackstone, 67. In Black's Law Dictionary, page 232, it is thus defined: "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the

statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment.

But this question is not a new one in this court. In *Interstate Commerce Commission v. Baltimore & Ohio Railroad*, 145 U. S. 263, 275, a case which involved interstate commerce, it was said by Mr. Justice Brown, speaking for the court:

“Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the interstate commerce act, 24 Stat. 879, c. 104, railway traffic in this country was regulated by the principles of common law applicable to common carriers.”

In *Bank of Kentucky v. Adams Express Co., and Planters' Bank v. Express Co.*, 93 U. S. 174, 177, the express companies received at New Orleans certain packages for delivery at Louisville. These were interstate shipments. In the course of transit the packages were destroyed by fire, and actions were brought to recover the value thereof. The companies defended on the ground of an exemption from liability created by the contracts under which they transported the packages. Mr. Justice Strong, delivering the opinion of the court after describing the business in which the companies were engaged, said:

“Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers.”

And then proceeded to show that they could not avail themselves of the exemption claimed by virtue of the clauses in the contract. The whole argument of the opinion proceeds upon the assumption that the common-law rule in respect to common carriers controlled.

Reference may also be made to the elaborate opinion of District Judge Shiras, holding the Circuit Court in the Northern District of Iowa, in *Murray v. Chicago & Northwestern Railway*, 62 Fed. Rep. 24, in which is collated a number of extracts from opinions of this court, all tending to show recognition of a general common law existing throughout the United States, not, it is true, as a body of law distinct from the common law enforced in the States, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and principles are set aside by express statute. It would serve no good purpose to here repeat those quotations; it is enough to refer to the opinion in which they are collated.

It is further insisted that even if there be a law which controls there is no evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained. But there was testimony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination. And

questions of fact, as has been repeatedly held, when once settled in the courts of a State, are not subject to review in this court. *Dower v. Richards*, 151 U. S. 658; *Egan v. Hart*, 165 U. S. 188; *Chicago, Burlington, etc. Railroad v. Chicago*, 166 U. S. 226-242; *Hedrick v. Atchison, Topeka & Santa Fé Railroad*, 167 U. S. 673, 677; *Gardner v. Bonestell*, 180 U. S. 362.

These are the only questions of a federal nature which are presented by the record, and finding no error in them the judgment of the Supreme Court of Nebraska is

Affirmed.

KLINE v. BAKER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[*Reported 99 Massachusetts Reports, 253.*]

GRAY, J. This action of replevin is brought by the seller of intoxicating liquors against a deputy sheriff attaching the same as the property of the purchaser. The plaintiff contends that the sales were induced by fraud of the purchaser and therefore passed no title to him; and the burden of proving this proposition is upon the plaintiff.

The seller resided in Pennsylvania, and the purchaser in Illinois. The goods were sold in two lots, one in June and the other in August, 1865, upon distinct orders sent by the purchaser to the seller. Although the first order was in accordance with terms of sale agreed on between the agents of the parties in Illinois, neither sale was complete until delivery of the goods. That delivery in each case was made to a railroad corporation in Philadelphia, which, in the absence of any agreement between the parties to the contrary, was in law a delivery to the purchaser. Each contract of sale therefore was completed in Pennsylvania, and its validity must be governed by the laws of that State. *Orcutt v. Nelson*, 1 Gray, 536; *Finch v. Mansfield*, 97 Mass. 89; 2 Kent Com. (6th ed.) 458.

The laws of another State are not laws of this Commonwealth, which our citizens are bound to know, or of which our courts have judicial knowledge; but they are facts, of which both citizens and courts must be informed as of other facts. As foreign laws can only be known so far as they are proved, no evidence of them can be admitted at the argument before this court, which was not offered at the trial or otherwise made part of the case reserved. *Knapp v. Abell*, 10 Allen, 485; *Bowditch v. Solytk*, 99 Mass. 138. When the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. *Holman v. King*, 7 Met. 384; *Dyer v. Smith*, 12 Conn. 384; *Moore v. Gwynn*, 5 Ired. 187; *Ingra-*

ham v. Hart, 11 Ohio, 255. But the qualifications of the experts, or other questions of competency of witnesses or evidence, must be passed upon by the court; and when the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone. Church v. Hubbard, 2 Cranch, 187; Ennis v. Smith, 14 How. 400; Owen v. Boyle, 15 Maine, 147; State v. Jackson, 2 Dev. 563; People v. Lambert, 5 Mich. 349; Bremer v. Freeman, 10 Moore P. C. 306; Di Sora v. Phillipps, 10 H. L. Cas. 624. And if the evidence is uncontradicted, and will not support the action, it is the duty of the court so to instruct the jury.

By the law of Massachusetts, purchasing goods with an intention not to pay for them is of itself a fraud which will render the sale void and entitle the seller to reclaim the goods. Dow v. Sanborn, 3 Allen, 181. The only evidence, introduced at the trial, of the law of Pennsylvania upon this subject was the cases of Smith v. Smith, 21 Penn. State, 317, and Backentoss v. Speicher, 31 Penn. State, 324, as published in the official reports, by which it appears that, in the opinion of the Supreme Court of that State, there must be "artifice, intended and fitted to deceive, practised by the buyer upon the seller," in order to constitute such a fraud as will make the sale void; and that the buyer's intention not to pay for the goods and concealment of his own insolvency is not such a fraud. These reports were competent, and, in the absence of all other evidence, conclusive proof, of the law of Pennsylvania. Gen. Sts. c. 131, § 64. Penobscot & Kenebec Railroad Co. v. Bartlett, 12 Gray, 244.

But the plaintiff introduced evidence that Burleigh, who was either a partner or the manager of the business of Dore, the purchaser, represented to Sheble, the agent of the plaintiff, at the time of negotiating with him for the purchase of the first lot of liquors, and within ten days before sending the order for them to Philadelphia, that Dore had a farm worth ten thousand dollars, and other means amply sufficient to carry on his business, and that he always purchased for cash and did not owe any man; and that these representations were false. This was clearly sufficient evidence of fraudulent representations intended to induce and in fact inducing the plaintiff to sell to Dore, or, in the language of the Supreme Court of Pennsylvania, "artifice, intended and fitted to deceive, practised by the buyer upon the seller," to warrant a jury in finding that the purchase made immediately afterwards on a credit of sixty days, as well as the subsequent purchase made before that credit had expired, was fraudulent and passed no title. The learned judge therefore erred in ruling that upon the evidence the plaintiff could not recover, and in directing a verdict for the defendant. Nichols v. Pinner, 18 N. Y. 295, and 23 N. Y. 264; Hall v. Naylor, 18 N. Y. 588; Reenie v. Parthemere, 8 Penn. State, 460; Seaver v. Dingley, 4 Greenl. 306; Wiggin v. Day, 9 Gray, 97.

Exceptions sustained.

STORY, J., in *OWINGS v. HULL*, 9 Pet. 607 (1835). [In error to the Circuit Court for the District of Maryland.] We are of opinion that the Circuit Court was bound to take judicial notice of the laws of Louisiana. The Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union in cases to which they respectively apply. The judicial power conferred on the general government by the Constitution extends to many cases arising under the laws of the different States. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. That jurisprudence is, then, in no just sense, a foreign jurisprudence, to be proved, in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.

BRADLEY, J., in *UNITED STATES v. PEROT*, 98 U. S. 428 (1879). We are bound to take judicial notice that the Mexican league was not the same as the American league. The laws of Mexico, of force in Texas previous to the Texan Revolution, were the laws not of a foreign, but of an antecedent government, to which the Government of the United States, through the medium of the Republic of Texas, is the direct successor. Its laws are not deemed foreign laws; for as to that portion of our territory they are domestic laws; and we take judicial notice of them. *Frémont v. U. S.*, 17 How. 542, 557.

FOREPAUGH v. DELAWARE, LACKAWANNA & WESTERN
RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA. 1889.

[*Reported 128 Pennsylvania State Reports, 217.*]

MITCHELL, J. Plaintiff, being the proprietor of a circus, made a special contract with defendant for the transportation of a number of his own cars, upon certain conditions and terms elaborately set out in writing, among which was a stipulation that, in consideration that the service was to be performed "for much less than the ordinary, usual, and legal rates charged other parties for a like amount of transportation," the plaintiff released the defendant from all liability for or on account of loss, damage, or injury to any of the animals, property, or things thus transported, "although such loss, damage, or injury may

be caused by the negligence of the [defendant], its agents or employes." Damage having occurred by the negligence of defendant, plaintiff brought this suit, and the sole question before us is whether it can be maintained in the face of the stipulation above set forth.

The contract was made, was to be performed, and the alleged breach occurred, in New York. No possible element was wanting, therefore, to make it a New York contract. It is admitted that in New York the stipulation is valid, and this action could not be maintained. *Cragin v. Railroad Co.*, 51 N. Y. 61; *Mynard v. Railroad Co.*, 71 N. Y. 180; *Wilson v. Railroad Co.*, 97 N. Y. 87. Why, then, should plaintiff, by stepping across the boundary into Pennsylvania, acquire rights which he has not paid for, and his contract does not give him?

It is argued that the validity of this contract is a question of commercial law, and therefore the mere decisions of the New York courts are not binding; and, in the absence of any statute in New York expressly authorizing such a contract, the courts of this State must follow their own views of the commercial as part of the general common law, though different views may be held as to such law by the courts of New York. This is the main argument of the plaintiff, and, as it is one which is frequently advanced, and affects a number of important questions, it is time to say plainly that it rests upon an utterly inadmissible and untenable basis. There is no such thing as a general commercial or general common law, separate from, and irrespective of, a particular State or government whose authority makes it law. Law is defined as a rule prescribed by the sovereign power. By whom is a general commercial law prescribed, and what tribunal has authority or recognition to declare or enforce it, outside of the local jurisdiction of the government it represents? Even the law of nations, the widest reaching of all, is a law only in name. It has but a moral sanction, and the only tribunal that undertakes to enforce it is the armed hand, the *ultima ratio regum*. The so-called commercial law is likewise a law only in name. Upon many questions arising in the business dealings of men, the laws of modern civilized States are substantially the same; and it is therefore common to say that such is the commercial law, but, except as a convenient phrase, such general law does not exist. There must be a State or government, of which every law can be predicated, and to whose authority it owes its existence as law. Without such sanction, it is not law at all; with such sanction, it is law without reference to its origin, or the concurrence of other States or people. Such sanction it is the prerogative of the courts of each State themselves to declare. Their jurisdiction is final and exclusive, and in this respect there is no distinction between statute and common law. It is universally conceded that, as to statutes, the decisions of the State courts are binding upon all other tribunals, yet such decisions have no higher sanction than those upon the common law; for what the latter determine, equally with the former, is the law of the particular State. The law of Pennsylvania consists of the Constitution,

treaties, and statutes of the United States, the Constitution and statutes of this State, and the common law, not of any or all other countries, but of Pennsylvania. There is a common law of England, and a common law of Pennsylvania mainly founded thereon, but with certain differences: and the only tribunal competent to pass authoritatively on such differences is a Pennsylvania court. To take a familiar illustration: In the United States the universal doctrine has always been that the English colonists brought with them, and made part of their laws, all the common law of England that was not unsuited to their new situation. No part of the common law of England is better settled than the doctrine of ancient lights. The Court of Chancery of New Jersey, in *Robeson v. Pittenger*, 2 N. J. Eq. 57 (1838), held that the same doctrine was part of the common law of New Jersey. The Supreme Court of Pennsylvania, on the other hand, starting with the same premises, and reasoning on the same principles but, proceeding cautiously from the dictum of Rogers, J., in *Hoy v. Sterrett*, 2 Watts, 331 (1834), to the unanimous decision of the court in *Haverstick v. Sipe*, 33 Pa. St. 368 (1859), held that the doctrine of ancient lights by prescription was not part of the common law of Pennsylvania. No tribunals of any other State presume to question that the common law of New Jersey and the common law of Pennsylvania differ on this point. What is law in one State is not law in the other, not because it was or was not the common law of England, but because it is or is not the law of the respective States; and, though it rests only on the decisions of the courts, it is none the less absolutely and indisputably the law, than if it had been made so by statute. I have purposely selected an illustration from the law relating to real estate, because, if I took one from the commercial law, it might seem like assuming the very question under discussion. But the example is none the less pertinent. The point is the force of judicial decisions on the common law, and the assumption that there is any tenable basis for holding them less binding upon such law than upon statutes. The so-called commercial law derives all its force from its adoption as part of the common law, and a decision on the commercial law of a State stands upon precisely the same basis as a decision upon any other branch of the common law. The only ground upon which any foreign tribunal can question either is that it does not agree with the premises or the reasoning of the court. But the same ground would enable it to question a decision upon a statute because a different construction seemed to it nearer the true intent of the legislative language, and this, it is universally conceded, no foreign court can do. There is no difference in principle. The decisions of a State court, upon its common law and on its statutes, must stand unquestioned, because it is the only authority competent to decide; or they must be alike questionable by any tribunal which may choose to differ with its reasons or its conclusions.

It is not probable that the doctrine of such a distinction would ever have got a foothold in jurisprudence, and it would certainly have been

long ago abandoned, had it not been for the unfortunate misstep that was made in the opinion in *Swift v. Tyson*, 16 Pet. 1. Since then the courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the State where the question arose. It is argued now that, as to such questions, the State courts also have similar liberty. It would be sufficient answer to this argument that such a course, by reading into a contract a new duty not in contemplation of the parties, and not part of it by the law of the place where it is made, is, in principle and in practical effect, impairing the obligation of the contract, which even the sovereign power of a State is prohibited from doing. But we prefer to rest the matter on the broader ground that the doctrine itself is unsound. The best professional opinion has long regarded it as indefensible on principle, and is thus very recently summed up by the most learned of living jurists: "Questions growing out of contracts made and to be performed in a State are decided by the national court of last resort, not in accordance with the unwritten or customary law of the State where they originated, as expounded by its courts, but agreeably to some theoretic view of a general commercial law, which does not exist, and is not to be found in the books. The State courts, on the other hand, adhere to their own precedents, and do not consider themselves entitled to impair the obligation of contracts that have been made in reliance on the principles which they have laid down through a long series of years. The result is a conflict of jurisdiction which there are no means of allaying. . . . Whether a recovery shall be had on a promissory note which has been taken as collateral security for an antecedent debt against a maker from whom it was obtained by fraud, is thus made to turn in New York, Pennsylvania, and Ohio, not on any settled rule, but on the tribunal by which the cause is heard; and, if that is federal, the plaintiff will prevail; if it is local, the defendant. Such a result tends to discredit the law. . . . The enumeration might be carried further, but enough has, perhaps, been said to show that no uniform rule can be deduced from the decisions of the English and American courts under the commercial law, and that the certainty requisite to justice can be obtained only by following the local tribunals as regards the contracts made in each locality. The several States of this country are collectively one nation, but they are as self-governing in all that concerns their purely internal commerce as if the general government did not exist; and when the will of the people of New York or Pennsylvania is declared on such matters, through their representatives in the local legislatures, expressly or by long-continued acquiescence in the rules enunciated by their judges, it cannot be set aside by Congress short of an amendment of the Constitution. Had the New York legislature declared that notes made and negotiated in that State should follow the rule laid down in *Coddington v. Bay* [20 Johns. 637], the federal tribunals would have been bound to carry it into effect, notwithstanding any attempt of the national legislature

to introduce a different principle; and it is inconceivable that the judicial department of the government can exercise a greater authority in this regard than the legislature." Hare, Const. Law, 1107, 1117, and see Lecture 51, *passim*.

We conclude, therefore, that the distinction between the binding effect of decisions on commercial law and on statutes is utterly untenable; that the law declared by State courts to govern on contracts made within their jurisdiction is conclusive everywhere; and the departure made by the United States courts is to be regretted, and certainly not to be followed. In entire accordance with this view are our own cases of *Brown v. Railroad Co.*, 83 Pa. St. 316, and *Brooke v. Railroad Co.*, 108 Pa. St. 530, 1 Atl. Rep. 206; and the decisions in Ohio: *Knowlton v. Railway Co.*, 19 Ohio St. 260; in Illinois: *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Railroad Co. v. Smith*, 74 Ill. 197; in Iowa: *Talbott v. Transportation Co.*, 41 Iowa, 247; *Robinson v. Transportation Co.*, 45 Iowa, 470; in Connecticut: *Hale v. Navigation Co.*, 15 Conn. 539; in Kansas: *Railroad Co. v. Moore*, 29 Kan. 632; in South Carolina: *Bridger v. Railroad Co.*, 27 S. C. 462, 3 S. E. Rep. 860; in Georgia: *Railroad Co. v. Tanner*, 68 Ga. 390; in Mississippi: *McMaster v. Railroad Co.*, 65 Miss. 271, 4 South. Rep. 59; in Texas: *Cantu v. Bennett*, 39 Tex. 303; *Ryan v. Railway Co.*, 65 Tex. 13, and perhaps in other States. I will not notice them in detail further than to quote the terse and forcible summary made by Scott, J., in *Knowlton v. Railway Co.*: "As the contract was made within the jurisdiction of New York, and contemplated no action outside of that jurisdiction, it is clear that the question of its validity must be determined solely by the laws of New York. The rights and obligations of the parties to such a contract, and in respect to the manner of its execution, cannot be affected by the laws or policy of other States. If no cause of action arose to the plaintiff under his contract when the accident occurred, the transaction cannot be converted into a cause of action by the fact that the parties have subsequently come within the jurisdiction of Ohio." Holding, therefore, that the validity of this contract is to be determined by the law of New York, as decided by the courts of that State, is there any reason why the courts of this State should not enforce it? The general rule is that courts will enforce contracts valid by the law of the place where made, unless they are injurious to the interests of the State, or of its citizens. Story, Conf. Laws, §§ 38, 244. The injury may be indirect by offending against justice or morality, or by tending to subvert settled public policy (2 Kent, Com. 458; *Greenwood v. Curtis*, 6 Mass. 358; *Bliss v. Brainard*, 41 N. H. 256); but this does not imply that courts will not sustain contracts that would not be valid if made within their jurisdiction, or will not enforce rights that could not be acquired there. Thus, for example, the courts of Pennsylvania have always enforced contracts for a higher rate of interest than would be valid under the laws of this State. *Ralph v. Brown*, 3 Watts & S. 395; *Wood v. Kelso*, 27 Pa. St. 243; *Irvine v. Barrett*, 2 Grant, Cas. 73. The con-

tract in the present case does not directly affect the State or its citizens in any way. Nor is it in any way contrary to justice or morality. It may be doubted whether it is even so far contrary to the policy of the State that it would have been invalid if it had been made here. It has some exceptional features, which, it is argued, take it out of the ordinary rules governing the contracts of common carriers; and the case of *Coup v. Railroad Co.*, 56 Mich. 111, 22 N. W. Rep. 215, is a strong authority for that position. But without stopping to discuss that point, which our general view renders unnecessary, it is sufficient to say that, even if it would not have been valid if made here, its enforcement as a New York contract does not in any way derogate from the laws of Pennsylvania, or injure or affect the policy of the State, any more than would a foreign contract for what would be usurious interest here, and that, as already said, the courts have never hesitated to enforce.

The argument of duress may be briefly dismissed for want of any evidence in the case to sustain it. There is no evidence that defendant was unwilling to accept the ordinary and usual rates for the transportation of plaintiff's cars and property. If they had been offered by plaintiff and refused, there might have been some ground for the present argument, though, in view of the peculiar nature of the property, and the special facilities required, even that is far from clear. But in fact plaintiff got a large reduction of rates, and part of the consideration for such reduction was the agreement that he should be his own insurer against loss by accident. There was nothing compulsory about such a contract, and plaintiff comes now with a very bad grace to assert a right that he expressly relinquished for a substantial consideration.

The learned court below was right in entering judgment for the defendant on the facts found in the special verdict.

Judgment affirmed.

WILLIAMS, J. (*dissenting*). I dissent from the judgment in this case because I cannot agree that a well-settled rule of public policy of this commonwealth must give way to considerations of mere comity. The contract set up as a defence to this action is a release to a common carrier from liability for its own negligence. It is well settled in this State that such a release is against public policy. Comity does not require more of us than to give effect to the *lex loci contractus*, when not subversive of the public policy of our own State. This has been distinctly held by the Court of Appeals of New York, in which this release was executed, and in whose behalf comity is asked. I would follow the Court of Appeals, because comity can require no more of us in any given case than the courts of the place of the contract would yield to us for comity's sake, and because I believe the rule to rest on solid ground.

STERRETT, J., concurs in the foregoing dissent.

CHAPTER II.

JURISDICTION OVER PERSONS AND THINGS.

SECTION I.

DOMICILE.¹

BELL v. KENNEDY.

HOUSE OF LORDS. 1868.

[*Reported Law Reports, 1 House of Lords (Scotch), 307.*]

THE LORD CHANCELLOR (LORD CAIRNS).² My Lords, this appeal arises in an action commenced in the Court of Session, I regret to say so long ago as the year 1858; in the course of which action no less than sixteen interlocutors have been pronounced by the court, all, or the greater part of which, become inoperative or immaterial if your Lordships should be unable to concur in the view taken by the court below of the question of domicile.

The action is raised by Captain Kennedy, and his wife, the daughter of the late Mrs. Bell; and the defender is Mrs. Kennedy's father, the husband of Mrs. Bell. The claim is for the share, said to belong to Mrs. Kennedy, of the goods held in communion between Mr. and Mrs. Bell. This claim proceeds on the allegation that the domicile of Mrs. Bell, at the time of her death on the 28th of September, 1838, was in Scotland. And the question itself of her domicile at that time depends upon the further question, what was the domicile of her husband? Her husband, the appellant, is still living; and your Lordships have therefore to consider a case which seldom arises, the question, namely, of the domicile at a particular time of a person who is still living.

Mr. Bell was born in the island of Jamaica. His parents had come there from Scotland, and had settled in the island. There appears to be no reason to doubt but that they were domiciled in Jamaica. His father owned and cultivated there an estate called the

¹ For the general principles of nationality see *Calvin's Case*, 7 Co. 1; *U. S. v. Wong Kim Ark*, 169 U. S. 649. — ED.

² The statement of facts is omitted, as are also the concurring opinions of Lords CRANWORTH, CHELMSFORD, and COLONSAY. — ED.

Woodstock estate. His mother died when the appellant was about the age of two years, and immediately after his mother's death he was sent to Scotland for the purpose of nurture and education. By his father's relatives he was educated in Scotland at school, and he afterwards proceeded to college. His father appears to have died when he was about the age of ten years, dying, in fact, as he was coming over to Great Britain for his health, but with the intention of returning to Jamaica.

The appellant, after passing through college in Scotland, travelled upon the Continent; and soon after he attained the age of twenty-one years he went out again to Jamaica, in the year 1823, with the intention of carrying on the cultivation of the Woodstock estate, which, in fact, was the only property he possessed. He cultivated this estate and made money to a considerable amount. He arrived at a position of some distinction in the island. He was the custos of the parish of St. George, and was a member of the Legislative Assembly. He married his late wife, then Miss Hosack, in Jamaica in the year 1828; and he had by her, in Jamaica, three children.

It appears to me to be beyond the possibility of doubt that the domicile of birth of Mr. Bell was in Jamaica, and that the domicile of his birth continued during the events which I have thus described.

In the year 1834 a change was made in the law with regard to slavery in the island of Jamaica, which introduced, in the first instance, a system of apprenticeship, maturing in the year 1838 into a complete emancipation. This change appears to have been looked upon by Mr. Bell with considerable disfavor, and, his health failing, in the year 1837 he determined to leave Jamaica, and to return to some part, at all events, of Great Britain. He entered into a contract for the sale of the Woodstock estate, the purchase-money being made payable by certain instalments; and in 1837 he left the island, to use his own expression, "for good." He abandoned his residence there without any intention at that time, at all events, of returning to the island. He reached London in the month of June, 1837. He remained in London for a short time, apparently about ten days, and he then went on to Edinburgh, and took up his abode under the roof of the mother of his wife, Mrs. Hosack, who at that time was living in Edinburgh.

I ought to have stated that while the appellant was in Jamaica he appears to have kept up a correspondence with his relatives and friends in Scotland. In the year 1833 he acquired (I prefer to use the term "acquired" rather than the word "purchased") the estates of Glengabers and Craka. He appears to have taken to those estates mainly in settlement of a claim for some fortune or money of his wife secured upon them. It is apparent, however, that he had at no time any intention of residing upon Glengabers, and, in fact, the acquisition of those estates bears but little, in my opinion, upon the question of domicile, because in 1833, when he acquired them, his

domicile, beyond all doubt, was, and for some years afterwards continued to be, in Jamaica.

He wrote occasionally at that time from Jamaica, evincing a desire to buy an estate at some future period in Scotland, if he could obtain one to his liking, and even an intention, if he could obtain such an estate, of living in Scotland, but nothing definite appears to have been arranged or said upon the subject; and, in fact, at this time other suggestions as to other localities appear to have been occasionally entertained and considered by him.

In these letters he frequently uses an expression that was much insisted upon at the bar — the expression of "coming home;" but I think it will be your Lordships' opinion that the argument is not much advanced, one way or the other, by that expression. It appears to me to be obviously a form of language that would naturally be used by a colonist in Jamaica speaking of the mother country in contradistinction to the colony.

Up to this point, my Lords, there is really no dispute with regard to the facts of the case. The birth-domicile of the appellant in Jamaica continued, at all events till 1837, and the onus lies upon those who desire to show that there was a change in this domicile, by which I mean the personal status indicated by that word, — the onus, I say, lies upon those who assert that the personal status thus acquired, and continued from the time of his birth, was changed, to prove that that change took place. The law is, beyond all doubt, clear with regard to the domicile of birth, that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired.

I do not think it will be necessary to examine the various definitions which have been given of the term "domicile." The question which I will ask your Lordships to consider in the present case is, in substance, this: Whether the appellant, before the 28th of September, 1838, the day of the death of his wife, had determined to make, and had made, Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country? The onus, as I have said, is upon the respondents to establish this proposition.

I will ask your Lordships, in the first place, to look at the facts subsequent to the return of the appellant to Scotland, as to which there is no dispute, then at the character of the parol evidence which has been adduced, and, finally, at a few passages in the correspondence which is in evidence.

As regards the facts which are admitted, they amount to this: The appellant lived under the roof of Mrs. Hosack from the time of his arrival in Edinburgh, in the year 1837, until the 1st of June, 1838. He appears to have borne the whole, or the greater part of her house-keeping expenses during that time. He inquired for, and

looked after, various estates, in the south of Scotland especially, and he indicated a preference for the estates of Blairston or Auchindraine, of Mollance, and of Enterkine. With regard to Blairston or Auchindraine, it does not appear, so far as I can discover, to have been actually offered to him for sale. With regard to Mollance, before he came to any determination as to it, it was sold to another person. With regard to Enterkine, at the time we are speaking of, the 1st of June, 1838, a negotiation had been going on by letters written between the appellant and those who were proposing to sell the estate, but the offer which he ultimately made for it had at that time been refused, and, on the 1st of June, 1838, there was no pending offer on his part for the property. Mrs. Bell, his wife, at this time was expecting her confinement. The house of his mother-in-law, in which they were sojourning, was not sufficiently commodious for their wants, and the appellant took for one year a furnished house in Ayrshire, called Trochraigue. He took it with no intention, apparently, of buying the estate, although it appears to have been for sale, but with the intention of living for a year in the house, and he hired servants for his accommodation. He removed to Trochraigue on the 1st of June, 1838, and, while so sojourning there, Mrs. Bell died in her confinement on the 28th of September in that year.

It appears to me, beyond all doubt, that prior to this time the appellant had evinced a great and preponderating preference for Scotland as a place of residence. He felt and expressed a great desire to find an estate there with a residence upon it, with which he would be satisfied. His wife appears to have been even more anxious for this than he himself was; and her mother and their friends appear to have been eager for the appellant to settle in Scotland. There is no doubt that, since the death of his wife, he actually has bought the estate which I have mentioned, the estate of Enterkine, and that his domicile is now in Scotland. All that, in my opinion, would not be enough to effect the acquisition of a Scotch domicile. There was, indeed, a strong probability up to the time of the death of his wife that he would ultimately find in Scotland an estate to his liking, and that he would settle there. But it appears to me to be equally clear that if, in the course of his searches, a property more attractive or more eligible as an investment had been offered to him across the Border, he might, without any alteration or change in the intention which he expressed or entertained, have acquired and purchased such estate and settled upon it, and thus have acquired an English domicile. In point of fact, he made more or less of general inquiry after estates in England; and a circumstance is told us by one of the witnesses, Mr. Telfer, which seems to me of great significance. Mr. Telfer says that his relations entertained great apprehension or dread that he would settle in England—a state of feeling on their part totally inconsistent with the notion

that he had, to their knowledge, at that time determined ultimately and finally to settle in Scotland.

These being the admitted facts, let me next turn to the character of the parol evidence in the case. As to the evidence of the members of the Hosack family, and of the servants, very little is to be extracted from it in the shape of information upon which we can rely. They speak of what they considered and believed was the intention of the appellant; but as to anything he said or did, to which alone your Lordships could attend, they tell us nothing beyond what we have from the letters. As to the evidence of the appellant himself, I am disposed to agree very much with what was said at the bar, that it is to be accepted with very considerable reserve. An appellant has naturally, on an issue like the present, a very strong bias calculated to influence his mind, and he is, moreover, speaking of what was his intention some twenty-five years ago. I am bound, however, to say, and therein I concur with what was said by the Court of Session, that the evidence of the appellant appears to be fair and candid, and that certainly nothing is to be extracted from it which is favorable to the respondents as regards the onus of proof which they have to discharge.

I will now ask your Lordships to look at what to my mind appears the most satisfactory part of the case, namely, the correspondence contemporaneous with the events in the years 1837 and 1838. I do not propose to go through it at length, but I will ask you to consider simply certain principal epochs in the correspondence from which, as it appears to me, we derive considerable light as to the intentions of the appellant.

In the first place, I turn to a letter written by the appellant on the 26th of September, 1837, three months after the appellant and his wife had come to Scotland. He is writing from Minto Street, Edinburgh, to his brother-in-law, Mr. William Hosack, in Jamaica, and he says: "I have not got rid of my complaint as yet, and still find difficulty in walking much, and was obliged to forego the pleasures of shooting, on which I had so much set my heart. This country is far too cold for a person not having the right use of his limbs. In fact I have been little taken with anything, and would go to Canada, Jamaica, or Australia, without hesitation. I enjoy the fresh butter and gooseberries." Of the latter — that is, of the gooseberries — he proceeds to state some evil consequences which he had suffered, and then he says: "Everything else is as good, or has an equivalent fully as good, in Jamaica. My mind is not made up as to the purchase of an estate. Land bears too high a value in proportion to other things in this country, owing to the members of the House of Commons and of Lords being all landowners, and having thereby received greater legislative protection. The reform voters begin to see this, and as soon as the character of the House of Commons changes enough (and it is changing prodigiously) the value of land

State. I have formed these views out in proportion my land-buying has stated, a domicile by birth in this country with an indeterminate and become the purchaser of, writing as: "I have been little taken with India, Jamaica, or Australia, without are significant as to the absence of make Scotland his fixed home, and there.

er, 1837, when the appellant, again law in Jamaica, says: "As to the e not purchased an estate, and not repaired, bought a pointer, pur or £10, have never been there, nor had a fishing rod in my hands only

I bought a horse, and might as states so, it would have been as easy I exchanged him for a mare, and, enjoy herself in a farm straw yard, on her back, or even touched her in that so far from his expressing a acquaintance, he says he does not mination to purchase an estate in it, he says, "I have not purchased so."

ere, I come to a letter dated the 20th the wife's expressions being even her husband; for it is obvious that ed to settle in Scotland. She writes: utor has put us a good deal out of dent of that, I don't find the satis- circumstances permitted, I would not ough, I dare say, after being here a his country is so gloomy, it is sadly like what one has been used to in pride and reserve of the people is nce. A man is not so much valued a gentleman as on the rank of his ay, among a certain class. You will Number 9. Bell has several prop- mined about where we may settle as ck he goes to Ayrshire to look at an way and Dumfriesshire. If we don't a furnished house in the country for e of this passage, I think, is of con- at sentence I have read affords a key

which may be useful in letting us into the design of the spouses in taking the furnished house of Trochraigue. The interpretation given by this letter is, that it was equivalent to saying that they had not at that time fixed upon a residence.

I pass on for two months more. The offer which in the interval he had made for Enterkine had been refused. The furnished house at Trochraigue had been taken. The appellant and his wife were upon the eve of taking possession of it on the 1st of June, 1838; and on the 28th of May, 1838, the appellant writes to his brother-in-law in Jamaica: "I have taken a country house at Trochrigg." "I leave this for it on the 1st of June. It is situated two miles from Girvan, which is twenty miles west of Ayr, on the seacoast. Therefore for the next twelve months you can address to me Trochrigg, near Girvan, Ayrshire, Scotland. The offer which I wrote you I have made for Enterkine I received no answer to until sixteen days after, and then I got an answer stating they had a better offer. Of this I believe as much as I like, for I see it advertised again in the Saturday's paper. I do not know whether I shall make anything of this estate for the present, and I care not. It is still very cold, and if I do not make a purchase in the course of this year, I perhaps will take a trip next summer to the south of France, and see whether I don't find it warmer there." That is to say in the next summer, which would be the summer of 1839, he was in expectation that Mrs. Bell and his family would be able to accompany him to "take a trip to the south of France, and see whether he did not find it warmer there," not, as it seems to me, for the purpose of enjoying a temporary sojourn, but, if he found it a more agreeable climate, for the purpose of making it his permanent residence.

There is only one other passage to which I would ask your Lordships' attention. It is in a letter written one month afterwards, while Mr. and Mrs. Bell were at Trochrigg, on the 16th of June. Writing to Mr. William Hosack, the appellant says: "There are several gentlemen's seats in the neighborhood, but none of them reside in them. We will probably have only three or four acquaintances, and shall be, in that respect, much the same as in Jamaica. We must, however, make the most of it for twelve months, in the hope that during that time I may be able to find some estate that will be suitable for me as a purchase."

I find nothing after this material in the correspondence before the death of Mrs. Bell, and the last sentence I have read appears to me to sum up and to describe most accurately the position in which the appellant was at Trochrigg; he was there in the hope that, during the "twelve months," he might be able to find some estate which might be suitable to him for purchase; but upon that contingency, as it seems to me, depended the ultimate choice which he would make of Scotland, or some other country, as a place of residence. If his hope should be realized, we might from this letter easily infer

that Scotland would become his home. If his hope should not be realized, I see nothing which would lead me to think, but everything which would lead me to doubt, that he would have elected to remain in Scotland as his place of residence.

It appears to me, on the whole, upon consideration of the facts which are admitted in the case, and the parol evidence, and the correspondence to which I have referred, that so far from the respondents having discharged the onus which lies upon them to prove the adoption of a Scotch domicile, they have entirely failed in discharging that burden of proof, and that the evidence leads quite in the opposite direction. There is nothing in it to show that the appellant's personal status of domicile as a native and an inhabitant of Jamaica has been changed on coming here by that which alone could change it, his assumption of domicile in another country. I am, therefore, unfortunately unable to advise you to concur in the opinion of the Court of Session. The Lord Ordinary entertained the opinion that the appellant, from the first moment of his arrival in Scotland, and of his sojourn at Mrs. Hosack's house, had acquired a Scotch domicile. But nothing could be more temporary — nothing more different from the state of things that would lead to the conclusion of the assumption of a Scotch domicile — than the circumstances under which that sojourn took place. Lord Cowan, in delivering the opinion of the Court of Session, appears, on the other hand, to have thought that the Scotch domicile was not acquired at the time of arrival in Scotland, but was acquired at the time of taking possession of Trochrigg. But if we are to put upon the occupation of Trochrigg the interpretation which the appellant himself put upon it at the time, so far from its being an assumption of a Scotch domicile, it appears to me to have borne an entirely different construction, and to have been a temporary place of sojourn, in order that a determination might be arrived at in the course of the sojourn as to whether a Scotch domicile should or should not ultimately be acquired.

There is one passage in the judgment of the Court of Session, delivered by Lord Cowan, to which I must ask your Lordships more particularly to refer, for it appears to me to afford a key to what I think, with great respect, I must call the fallacious reasoning of the judgment. After speaking of the parol evidence given by the appellant, Lord Cowan uses these words: "For after all, what do the statements of the defender truly amount to? Simply this, that prior to September, 1838, he had not fixed on any place of permanent residence, and had not finally made up his mind or formed any fixed intention to settle in Scotland before he bought Enterkine. There is no statement that he had it in his mind to take up his residence elsewhere than in Scotland." If, my Lords, I read these words correctly, Lord Cowan appears to have intimated that in his opinion it would not be enough to find that the appellant had not fixed on any

place of permanent residence prior to September, 1838, and had not decidedly made up his mind or formed a fixed intention to settle in Scotland, unless proof were also adduced that he had it in his mind to take up his residence elsewhere than in Scotland. I venture to think that would be an entirely fallacious mode of reasoning, and would be entirely shifting the position of the proof which has to be brought forward. The question, as it seems to me, is not whether he had made up his mind to take up his residence elsewhere than in Scotland, but the question is, had he, prior to September, 1838, finally made up his mind or formed a fixed intention to settle in Scotland. Lord Cowan appears to admit that the parol evidence itself would show that that had not been done, and that parol evidence is, in my mind, fortified and made very much more emphatic by the evidence of the correspondence to which I have referred.

I have humbly, therefore, to advise your Lordships to assoilzie the defender from the conclusions of the summons, and to reverse the sixteen interlocutors which have been pronounced by the court below.

LORD WESTBURY. My Lords, I have very few words to add to what has been already stated to your Lordships; and, perhaps, even those are not quite necessary.

What appears to me to be the erroneous conclusion at which the Court of Session arrived is in great part due to the circumstance, frequently lost sight of, that the domicile of origin adheres until a new domicile is acquired. In the argument, and in the judgments, we find constantly the phrase used that he had abandoned his native domicile. That domicile appears to have been regarded as if it had been lost by the abandonment of his residence in Jamaica. Now, residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now this case was argued at the bar on the footing, that as soon as Mr. Bell left Jamaica he had a settled and fixed intention of taking up his residence in Scotland. And if, indeed, that had been ascertained as a fact, then you would have had the *animus* of the party clearly demonstrated, and the *factum*, which alone would remain to be proved, would in fact be proved, or, at least, would result immediately upon his arrival in Scotland.

The true inquiry, therefore, is, Had he this settled purpose, the moment he left Jamaica, or in course of the voyage, of taking up a

and? Undoubtedly, part of the party; but the only external act with his wife to Edinburgh, the visit his wife's relations. We that time; but with what animus there we have yet to ascertain. Some small *prima facie* proof of inferred from the fact of residence you do not find that the party was or in contemplation.

More properly described by words when he left Jamaica he might be described *atque ubi constituit domicilium*. To fix his habitation was to him at that time; and, as appears from the letters that irresolution, that want of settled mind down to the time when he actually died. But the *punctum temporis* directed as to Mr. Bell's intention the question is, had he any settled residence in Scotland on the 28th of September with an observation which was in the letters are the best evidence of the Lordships' attention has been to the language of the wife's letters, of the husband's letters written to those whom he had left in Jamaica, in which he said that he was a man who had a residence in Scotland his future place of residence, to make it his future home. That with perfect clearness and certainty that the domicile of origin can have no hesitation in answering the question on the 28th of September. It was then that he was resident in Scotland, but therefore he still retained his domicile.

It is a regret, that although it might be the commencement of this cause that it was a question, yet we find that ten years, with enormous expenses, and an accumulation of other matters, which require if judicial attention had been given, which alone was sufficient for the

GENERAL G. POTTINGER, 6 H. & N.
whether Sir Henry Pottinger at the

time of his decease was domiciled in England or in India. . . . The only doubt arises from this, that he continued in the service of the East India Company, and might have been called upon at any time to serve in India. In *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285, which was cited to establish that because an Indian officer continued liable to be called upon to serve in India he could not acquire an English domicile, the court decided that such circumstances constituted a strong reason against such an officer acquiring a French domicile. But the distinction between a foreign and an English domicile is pointed out in the judgment, and Lord Cranworth in the course of Dr. Phillimore's reply, said: "If the deceased had gone to Scotland on furlough, and resided there as long as he did in France, it would be difficult to say that he had not acquired a Scotch domicile." Applying that to this case, I think that, notwithstanding Sir Henry Pottinger continued in the Indian army, his purchase of a dwelling-house in Eaton Place, his continuing to hold it whilst absent from England, his return to it as his place of residence and his home, and his reference to it in his will as his residence, abundantly establishes his English domicile.¹

PUTNAM v. JOHNSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1813.

[Reported 10 Massachusetts, 488.]

CASE against the selectmen of Andover for refusing to insert plaintiff's name on the voting-list of the town.² At the trial of the action, which was had upon the general issue before SEWALL, J., at the Sittings here after this term, a verdict was found for the plaintiff, subject to the opinion of the court upon certain facts agreed by the parties, and certain evidence given at the trial, and reported by the judge who presided thereat.

It was admitted that the plaintiff was born in Danvers, on the 24th day of November, 1786; that he resided there, in his father's family, until he entered Dartmouth College, in August, 1805; that he was graduated at the said college in 1809; that he then went to Salem, and resided there as a student at law until the 13th of April, 1812, when he went to Andover; that he resided in Andover during the vacation of six weeks [in the theological seminary] in May and June, 1812, and of the vacation of six weeks in the autumn of that year he spent about half at his father's house in Danvers, and in visits to different places; that he did, on the first Monday of April, 1813, request the defendants to insert his name upon the list of

¹ *Acc. Moor v. Harvey*, 128 Mass. 219.

In *Hamilton v. Dallas*, 1 Ch. D. 257 (1875), it was held that a British peer, though a member of the House of Lords, may acquire a domicile in France. — Ed.

² This short statement is substituted for the declaration, given by the Reporter. — Ed.

voters in Andover, for senators; that they refused to insert it; that at the said meeting he offered his vote for senators, and the defendants refused to receive it; that he possessed sufficient personal estate; and that he was taxed in Salem in the years 1810 and 1811, and paid his taxes, and voted in said town after March, 1810, until he left that place in April, 1812.

The judge also reported that Eleazar Putnam, the father of the plaintiff, testified that his son, since he left college, had received no support from him, or any assistance except in the way of credit to him, and was not of the father's family, but separated, and, as the father believed, was upon the charity foundation at Andover, and that he owned some real estate. Mark Newman, Esquire, testified that the plaintiff was upon the charity foundation in the theological seminary at Andover; that students in divinity on that foundation are restricted to a residence of three years before they are entitled to a license to preach, and are permitted to continue their residence there afterwards; that the residence of students is in chambers, as at a college, with board in commons; that he had not known of any students in the theological institution who had been admitted to vote, and that they had not taken any concern in town affairs; that a Mr. Scammon, in 1812, while a student, claimed a right to vote, and was refused; and that theological students, when licensed to preach and employed as candidates for the ministry, reside and make their home at the institution, and in the vacations generally go from thence, but sometimes continue there.¹

PARKER, J. The plaintiff, being a citizen of the commonwealth, more than twenty-one years of age, and of competent property, is without doubt entitled to vote somewhere within the State for State officers.

By the facts reported in this case, it is manifest that Andover or Danvers is the place where the plaintiff has his home, within the true intent of the constitution. Although he was born in Danvers, and that is still the domicile of his father, yet he was of an age to emancipate himself, and obtain a home in some other town. He went to Andover, and had resided there a few days short of a year, previous to the election in April, 1813. A year's residence was not necessary to entitle him to vote in that town; it was sufficient that he made that his home. He had left his father's family several years before, and had become a resident in Salem, where he was taxed and permitted to vote. His father had ceased to support him since the year 1809, before which time he was also of age; and he was at Salem, preparing himself for an independent living, until the spring of 1812, when he removed to Andover, to pursue his theological studies there, which, as he was on the charitable foundation, required a residence of three years.

¹ Arguments of counsel are omitted. — Ed.

Was Andover, then, his dwelling-place or home? This is the question now to be solved. It is manifest that Danvers was not; for he had abandoned it, and did not keep up his connection with his father's family, as was the case of Emmons in *Granby v. Amherst*, 7 Mass. 1, cited in the argument. He could not vote in Danvers, for his home was not there. He must, then, have a right to vote in Andover, or be subjected to a temporary disfranchisement, in consequence of his having no home in any place.

The objection most insisted on by the counsel for the defendants is, that the plaintiff did not go to Andover with an intention to remain there; but merely for the purpose of instruction, and therefore that he could not exercise any of his civil privileges within that town; although it was admitted that a mechanic or day-laborer, otherwise qualified, making Andover his home, by residing and dwelling there, would be a legal voter there.

A residence at a college or other seminary, for the purpose of instruction, would not confer a right to vote in the town where such an institution exists, if the student had not severed himself from his father's control, but resorted to his house as a home, and continued under his direction and management. But such residence will give a right to vote to a citizen not under pupillage, notwithstanding it may not be his expectation to remain there forever.

The definition of domicile, as cited from Vattel by the counsel for the defendants, is too strict, if taken literally, to govern in a question of this sort; and, if adopted here, might deprive a large portion of the citizens of their right of suffrage. He describes a person's domicile as the habitation fixed in any place, with an intention of always staying there. In this new and enterprising country, it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain. Probably the meaning of Vattel is, that the habitation fixed in any place, without any present intention of removing therefrom, is the domicile. At least, this definition is better suited to the circumstances of this country.

But several cases have been cited from our own reports, which are supposed to be analogous to the case at bar, in which the settlement of paupers has been decided upon more strict principles than are now suggested. The case of *Granby v. Amherst* is the strongest; and it is manifest that there is nothing, even in that case, which contradicts the principles now advanced. The pauper there left Belchertown and went to Dartmouth College, merely for the purpose of education. He was under age while at college, until a few months before he was graduated. He passed all his vacations in Belchertown, he had a

freehold there, and he returned to that place as soon as he had taken his degree. It was very properly held that, under these circumstances, he had not changed his domicile by going to Dartmouth College, and remaining there four years.¹

But the decisions of settlement cases cannot have much influence on questions of political privileges. In the former cases, there is a conflict between two corporations on a subject of property; and they must be determined strictly according to the established rules of property. The objects intended to be secured by the constitutional limitation of the right of suffrage to the town in which the voter has his home, were opportunity to ascertain the qualifications of the voter, and the prevention of fraud upon the public by multiplying the votes of the same person. The plaintiff had lived long enough in Andover to give the selectmen the means of scrutinizing his claims; and there was no other place where he could have a pretence for voting.

Further, a citizen may well have his home in one town, with all the privileges of an inhabitant, and yet have his legal settlement in another town. For instance, if he should reside four years in a town, own and occupy real property there, gain a livelihood there for himself and his family, without any intention of removing, he might, notwithstanding, be removed to the place of his lawful settlement, in case he should become chargeable. But it would be hard to say he had no home there, that he did not dwell there, and therefore that he should not be permitted to vote there.

We are all of opinion that the plaintiff's case is well made out, and that judgment must be entered on the verdict.²

ABINGTON v. NORTH BRIDGEWATER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1840.

[Reported 23 Pickering, 170.]

SHAW, C. J., drew up the opinion of the court.³ The question of Ebenezer Hill's settlement depends upon this, whether he was an inhabitant of North Bridgewater before the 10th of April, 1767. If his house or place of residence was in that town, he acquired a settlement there, and the defendants are liable, otherwise not.

In the several provincial statutes of 1692, 1701, and 1767 upon this subject, the terms "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," "coming to reside

¹ *Acc. Vanderpoel v. D'Hanlon*, 53 Ia. 246; *Frye's Election*, 71 Pa. 302. — Ed.

² *Acc. Sanders v. Getchell*, 76 Me. 158; *Hicks v. Skinner*, 72 N. C. 1.

Residence for voting means actual domicile. *Dennis v. S.*, 17 Fla. 389. — Ed.

³ The opinion only is given: it sufficiently states the case. — Ed.

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and dwell," are frequently and variously used, and, we think, they are used indiscriminately, and all mean the same thing, namely, to designate the place of a person's domicile. This is defined in the Constitution, c. 1, § 1, for another purpose, to be the place "where one dwelleth or hath his home."

The fact of domicile is often one of the highest importance to a person; it determines his civil and political rights and privileges, duties and obligations; it fixes his allegiance; it determines his belligerent and neutral character in time of war; it regulates his personal and social relations whilst he lives, and furnishes the rule for the disposal of his property when he dies. Yet as a question of fact, it is often one of great difficulty, depending sometimes upon minute shades of distinction, which can hardly be defined. It seems difficult to form any exact definition of domicile, because it does not depend upon any single fact, or precise combination of circumstances. If we adopt the above definition from the Constitution, which seems intended to explain the matter and put it beyond doubt, it will be found, on examination, to be only an identical proposition, equivalent to declaring, that a man shall be an inhabitant where he inhabits, or be considered as dwelling or having his home where he dwells or has his home. It must often depend upon the circumstances of each case, the combinations of which are infinite. If it be said to be fixed by the place of his dwelling-house, he may have dwelling houses in different places; if it be where his family reside, his family with himself may occupy them indiscriminately, and reside as much in one as another; if it be where he lodges or sleeps (*pernoctat*), he may lodge as much at the one as the other; if it be his place of business, he may have a warehouse, manufactory, wharf, or other place of business, in connection with his dwelling-house in different towns. See *Lyman v. Fiske*, 17 Pick. 231. But without pursuing this general view further, to show that it is difficult, if not impossible, to lay down any general rule, on account of the very diversified cases which may be supposed, yet it will generally be found in practice, that there is some one or a few decisive circumstances which will determine the question.

In coming to the inquiry in each case, two considerations must be kept steadily in view, and these are, —

1. That every person must have a domicile somewhere; and
2. That a man can have only one domicile, for one purpose, at one and the same time.

Every one has a domicile of origin, which he retains until he acquires another; and the one thus acquired is in like manner retained.

The supposition, that a man can have two domiciles, would lead to the absurdest consequences. If he had two domiciles within the limits of distant sovereign States, in case of war, what would be an act of imperative duty to one, would make him a traitor to the other. As not only sovereigns, but all their subjects, collectively and indi-

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vidually, are put into a state of hostility by war, he would become an enemy to himself, and bound to commit hostilities and afford protection to the same persons and property at the same time.

But without such an extravagant supposition, suppose he were domiciled within two military districts of the same State, he might be bound to do personal service at two places, at the same time; or in two counties, he would be compellable, on peril of attachment, to serve on juries at two remote shire towns; or in two towns, to do watch and ward in two different places. Or, to apply an illustration from the present case. By the provincial laws cited, a man was liable to be removed by a warrant to the place of his settlement, habitancy, or residence, for all these terms are used. If it were possible that he could have a settlement or habitancy in two different towns at the same time, it would follow that two sets of civil officers, each acting under a legal warrant, would be bound to remove him by force, the one to one town, and the other to another. These propositions, therefore, that every person must have some domicile, and can have but one at one time, for the same purpose, are rather to be regarded as *postulata* than as propositions to be proved. Yet we think they go far in furnishing a test by which the question may be tried in each particular case. It depends not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs, tending to establish it in another; such an inquiry, therefore, involves a comparison of proofs, and in making that comparison, there are some facts which the law deems decisive, unless controlled and counteracted by others still more stringent. The place of a man's dwelling-house is first regarded, in contradistinction to any place of business, trade, or occupation. If he has more than one dwelling-house, that in which he sleeps or passes his nights, if it can be distinguished, will govern. And we think it settled by authority, that if the dwelling-house is partly in one place and partly in another, the occupant must be deemed to dwell in that town in which he habitually sleeps, if it can be ascertained.

Lord Coke, in 2 Inst. 120, comments upon the statute of Marbridge respecting courts leet, in which it says, that none shall be bound to appear, *nisi in balivis ubi fuerunt conversantes*; which he translates, "but in the bailiwicks, where they be dwelling." His Lordship's comment is this: "If a man have a house within two leets, he shall be taken to be conversant where his bed is, for in that part of the house he is most conversant, and here conversant shall be taken to be most conversant." This passage, at first blush, might seem to imply that the entire house was within two leets. But no man can be of two leets. 2 Doug. 538; 2 Hawk. P. C. c. 10, § 12. Indeed, the whole passage, taken together, obviously means, a house partly within one leet and partly within another; otherwise, the bed would be within the two leets, as well as the house.

It is then an authority directly in point to show, that if a man has a dwelling-house, situated partly within one jurisdiction and partly in another, to one of which the occupant owes personal service, as an inhabitant, he shall be deemed an inhabitant within that jurisdiction within the limits of which he usually sleeps.

The same principle seems to have been recognized in other cases, mostly cases of settlement, depending on domicile. *Rex v. St. Olaves*, 1 Str. 51; *Colechurch v. Radcliffe*, 1 Str. 60; *Rex v. Brighton*, 5 T. R. 188; *Rex v. Ringwood*, 1 Maule & Selw. 381.

I am aware that the same difficulty may arise as before suggested, which is, that the occupant may not always, or principally, sleep in one part of his house, or if he sleeps in one room habitually, the dividing line of the towns may pass through the room or even across his bed. This, however, is a question of fact depending upon the proofs. When such a case occurs, it may be attended by some other circumstance decisive of the question. If the two principles stated are well established, and we think they are, they are, in our opinion, sufficient to determine the present case. It becomes, therefore, necessary to see what were the facts of this case, and the instructions in point of law upon which it was left to the jury.

The plaintiffs contended that two monuments pointed out by them were true and genuine monuments of the Colony line, and if so, a straight line drawn from one to the other would leave the house wholly in North Bridgewater, and the jury were instructed, if they so found, to return a verdict for the plaintiffs. But the jury stated, on their return, that on this point they did not agree, and therefore that part of the instruction may be considered as out of the case. It is therefore to be taken that, in point of fact, the line ran through the house, leaving a small part in Randolph and a large part in North Bridgewater. In reference to this, the jury were instructed, that if that line would leave a habitable part of the house in Randolph, the verdict should be for the defendants; otherwise, for the plaintiffs. The jury were also directed to find, specially, whether the beds of the family in which they slept, and the chimney and fireplace, were or were not in North Bridgewater. The jury found a verdict for the plaintiffs, which in effect determined, in point of fact, that the line did run through the house, leaving a small part in Randolph, that the beds and fireplaces of the house were on the North Bridgewater side of the line, and that there was not a habitable part of the house in Randolph.

What was the legal effect of this instruction to the jury? To understand it, we must consider what was the issue. The burden of proof was upon the plaintiffs, to prove that Hill had his settlement in North Bridgewater. But proving that he had a dwelling-house, standing partly in North Bridgewater and partly in Randolph, would leave it wholly doubtful whether he had his domicile in the one or the other, provided that the line passed the house in such a direction

as that either would have been sufficient for the purpose of a habitation; because it would still be doubtful whether he dwelt upon one or the other side of that line. But if the line ran in such a direction as to leave so small a portion on one side that it could not constitute a human habitation, then the position of the dwelling determined the domicile. In any other sense, we see not how the correctness of the instruction could be maintained. If the term "habitable part of the house" was intended to mean a portion of the house capable of being used with the other part for purposes of habitation, and the whole constituting together a place of habitation, then every part of the house capable of being used would be a habitable part. The instruction was, that if a habitable part was in Randolph, the occupant did not acquire a domicile in North Bridgewater; it would be equally true in law, that if a habitable part was in North Bridgewater, he did not acquire a domicile in Randolph. If the term "habitable," then, were used in the restricted sense, capable of being used as a part, and not as the whole of a human habitation, the instruction would amount to this, that living ten years in a dwelling-house divided by an imaginary line into parts, both of which are useful and capable of being used as parts of a dwelling-house, the occupant would acquire no domicile. But this is utterly inconsistent with the principles of domicile. By leaving his domicile in Abington, and living in the house in question, Hill necessarily lost his domicile in Abington, and necessarily acquired one by living in that house; and this must be in either Randolph or Bridgewater, and not in both. It may be impossible, from lapse of time and want of evidence, to prove in which, and therefore the plaintiffs, whose case depends on proving affirmatively that it was in North Bridgewater, may fail; nevertheless it is equally true, in itself, that he did acquire a domicile in one, and could not acquire one in both of those towns. Suppose the proof were still more deficient; suppose it were proved beyond doubt, that Hill lived in a house situated on a cleared lot of one acre through which the town line were proved to run, but it were left uncertain in the proof on which part of the lot the house was situated. It would be true that he lost his domicile in Abington, and acquired one in Randolph or North Bridgewater; but it being entirely uncertain which, the plaintiffs would fail of proving it in North Bridgewater, and therefore could not sustain their action. So if the line ran through a house in such a manner that either side might afford a habitation, then dwelling in that house would not of itself prove in which town he acquired his domicile, though he must have acquired it in one or the other. In this sense we understand the instruction to the jury, and in this sense we think it was strictly correct. If they should find that the line so ran through the house as to leave a part capable, of itself, of constituting a habitation, in Randolph, then dwelling in that house, though partly in North Bridgewater, did not necessarily prove a domicile in North Bridgewater.

Under this instruction the jury found a verdict for the plaintiffs, and we think it is evident from this verdict, that they understood the instruction as we understand it. The jury find that one corner of the house, to the extent of two feet and one inch, was in Randolph, but that no habitable part of the house was in Randolph; not, as we think, no part capable of being used with the rest of the house for the purpose of habitation, but no part capable, of itself, of constituting a habitation; from which they draw the proper inference, that the habitation and domicile, and consequently the settlement, was in North Bridgewater.

And if we look at the fact, specially found by the jury, we are satisfied that they drew the right conclusion, and could come to no other. If the line had divided the house more equally, we think, on the authorities, that if it could be ascertained where the occupant habitually slept, this would be a preponderating circumstance, and, in the absence of other proof, decisive. Here it is found, that all the beds, the chimney and fireplace, were within the North Bridgewater side of the line, and that only a small portion of the house, and that not a side but a corner, was within the Randolph side, and that so small as to be obviously incapable of constituting a habitation by itself. We think, therefore, that the instruction was right, and the verdict conformable to the evidence.

*Judgment on the verdict for the plaintiffs.*¹

HAGGART v. MORGAN.

COURT OF APPEALS, NEW YORK. 1851.

[*Reported 5 New York, 422.*]

GARDINER, J.² The defendants at the trial offered to prove "that at the time of taking out the attachment mentioned in the pleadings, and at the time of the giving of the bond in suit, the debtor, Brandegee, was not a non-resident of the city of New York, but a resident. That he had been absent about three years, in attending a law-suit at New Orleans, and returned in the spring of 1848." The judge excluded the evidence on the grounds, — 1st, That the offer itself showed the debtor to be a non-resident, at the time when the attachment issued, within the spirit of the act; 2d, that the giving of the bond to discharge the attachment prevented him from showing such fact; and the defendant excepted. This exception presents the only question in the cause worthy of serious consideration.

The ruling of the judge was probably correct for the reasons assigned by him. In the matter of Thompson, 1 Wend. 45, the distinc-

¹ *Acc. Judkins v. Reed, 48 Me. 386. — Ed.*

² Part of the opinion only is given. — Ed.

tion was taken between the residence of the debtor and his domicile. It was there held that his residence might be abroad, within the spirit of the statute, which was intended to give a remedy to creditors whose debtors could not be served with process, while his domicile continued in this State. In *Frost v. Brisbin*, 19 Wend. 14, it was said, in a case like the present, that actual residence, without regard to the domicile of the defendant, was within the contemplation of the statute. It was part of the offer of the defendants to prove that the debtor left this State in November, 1844, and returned in the spring of 1848, and that this absence of three years and a half was necessary to accomplish the business in which he was engaged. He was therefore a non-resident when the attachment was issued, within these decisions, although domiciled in New York.¹

WILLIAMS v. ROXBURY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1858.

[Reported 12 Gray, 21.]

ACTION of contract to recover back the amount of a tax assessed on the 1st of May, 1856, upon personal property held by the plaintiff as trustee under the will of John D. Williams, for the benefit of Mrs. Sarah A. W. Bradlee, formerly Miss Merry, and paid under protest. The parties agreed that if, in the opinion of the court, upon so much of the following facts as would be admissible in evidence, Richards Bradlee, her husband, was a resident of Brookline, judgment should be rendered for the plaintiff; otherwise, for the defendants.

Richards Bradlee was born in Brattleboro, Vt., lived there until the age of sixteen, then went to New York, and there remained until after he became of age in the spring of 1855, when he returned to Brattleboro for the purpose of finding some employment, but with a view of going to the West, and, after passing the summer in Brattleboro, went to St. Louis in October in search of employment, and entered a store as a clerk, but under no contract for any fixed length of time; and in the following winter at St. Louis met Miss Merry, who resided in Roxbury, and became engaged to marry her. He never had any intention of making Roxbury his residence. In

¹ *Acc.* *Krone v. Cooper*, 43 Ark. 547; *Ludlow v. Szold*, 90 Ia. 175, 57 N. W. 676 (see, however, *Church v. Crossman*, 49 Ia. 444); *Risewick v. Davis*, 19 Md. 82; *Alston v. Newcomer*, 42 Miss. 186; *Johnson v. Smith*, 43 Mo. 499; *Long v. Ryan*, 30 Grat. 718. *Contra*, *Wood v. Roeder*, 45 Neb. 311, 63 N. W. 853; *Stratton v. Brigham*, 2 Sneed, 420. And see *Ballinger v. Lautier*, 15 Kan. 608; *Clark v. Likens*, 26 N. J. L. 207.

A similar rule prevails as to "settlement" or "residence" in poor-law cases. *Jefferson v. Washington*, 19 Me. 293; *North Yarmouth v. West Gardiner*, 58 Me. 207. — Ed.

March, 1856, he hired a house in Brookline, at a rent to begin on the 1st of April, for the residence of himself and his wife; visited it with her several times to set up the furniture; put a housekeeper and servants in charge of it, and removed into it his and Miss Merry's movable property. They were married in Roxbury on the 9th of April, and on the same day started on a wedding tour, with the intention of returning, not to Miss Merry's former residence in Roxbury, but to the furnished house in Brookline, and on the 2d of May did return to that house.

C. A. Welch, for the plaintiff.

W. Gaston, for the defendants.

SHAW, C. J. The question of domicile is a question of fact. It is a question of comparison of facts. Had Mr. Bradlee previously had a clear, fixed, and decided domicile, the circumstances would hardly be sufficient to show an acquisition of a domicile in Brookline. But when we compare the facts, we are brought to the opposite result. Brattleboro was his domicile of origin, but he scarcely ever visited there, and soon after coming of age went to St. Louis, and was there three or four months as a clerk, and there formed a marriage engagement with Miss Merry. He then came to Massachusetts, without any intention to return to St. Louis with his wife. But he came to Massachusetts to fulfil his engagement. He acquired no domicile at Roxbury. He took a lease of a house in Brookline in March, the rent to commence on the 1st of April; took possession; put in a housekeeper; visited the house for the purpose of putting up furniture, and removed all his own and his wife's property to it, before their marriage. His subsequent absence was only temporary; he left on a marriage tour, with the intention to return to live in Brookline, and on his return he took actual possession of the house which he had hired. Our conclusion is that upon a balance of all the facts the domicile was in Brookline, and that

*The plaintiff is entitled to judgment.*¹

GILMAN v. GILMAN.

SUPREME JUDICIAL COURT OF MAINE. 1868.

[Reported 52 Maine, 165.]

DAVIS, J.² This case comes before us upon an appeal from a decree of the Probate Court, admitting to probate and allowing the

¹ *Acc. Mann v. Clark*, 33 Vt. 55.

If the fact of residence and the intention to stay indefinitely concur, a domicile is gained at once, for however short a time the residence or the intent continues. *Parsons v. Bangor*, 61 Me. 457; *Stockton v. Staples*, 66 Me. 197; *Thorndike v. Boston*, 1 Met. 242; *McConnell v. Kelley*, 138 Mass. 372; *Horne v. Horne*, 9 Ired. 99. — ED

² The opinion only is given: it sufficiently states the case. — ED.

not questioned. But the testator left a city of New York as well as in this moved and allowed there, on proof of inquiry in regard to domicile. The and that jurisdiction of the property of the will, whether the testator's

3. And, in that case, the movable

to have a distinct and clear idea of "domicile," before applying it to this case. However, to find a definition that has defined it as "the habitation fixed in and of always staying there." This is the case of Savage, C. J., in Thompson's Case, 10 Roberts' Will, 8 Paige, 519, Chancery substance. "Domicile is the actual

east for an indefinite time." Vattel's
Barker, J., in Putnam v. Johnson, 10
is said to be "the habitation fixed in
intention of removing therefrom."

were criticised, with much force, by
Case of Regina v. Stapleton, 18 Eng.

He suggests that, if one should go to
remaining there ten years, and then
hardly be said to continue in England.
In England, as stated in the supposed

case, his domicile might properly be considered there. But, if a citizen of Maine, with his family, or having no family, should go to California, to engage in business there, with the intention of returning at some future time, definite or indefinite, and should establish himself there, in trade or agriculture, it is difficult to see upon what principle his domicile could be said still to be here. His residence there, with the intention of remaining there a term of years, might so connect him with all the interests and institutions, social and public, of the community around him, as to render it not only proper, but important, for him to assume the responsibilities of citizenship, with all its privileges and its burdens. Such residences are not strictly within the terms of any definition that has been given; and yet it can hardly be doubted that they would be held to establish the domicile.

Other definitions have been given, which, though more general, are better adapted to determine the case at bar. Thus Story, in his *Conflict of Laws*, says that one's domicile is "his true, fixed, permanent home, and principal establishment, to which, whenever he is absent, he means to return." And, in *Munroe v. Munroe*, 7 Cl. & Fin. 877, Lord Cottenham says that, to effect the abandonment of one's domicile, and to substitute another in its place, "is required the choice of a place, actual residence in the place chosen, and that it should be the principal and permanent residence."

That the testator's original residence was in Waterville is admitted. There he established himself in business, accumulated property, was married, and owned a house, in which, either continuously or at intervals, he resided, with his family, until he died there in 1859.

It has been laid down as a maxim on this subject, that every person must have a domicile somewhere. *Abington v. North Bridgewater*, 23 Pick. 170. This may be doubtful in its application to some questions. A life may be so vagrant that a person will have no home in any city or town where he can claim any of the rights or privileges appertaining to that relation. But, in regard to questions of citizenship, and the disposition of property after death, every person must have a domicile. 1 Amer. Lead. Cas. 725, note. For every one is presumed to be a subject of some government while living; and the law of some country must control the disposition of his property upon his decease. It is therefore an established principle of jurisprudence, in regard to the succession of property, that a domicile once acquired continues until a new one is established. Therefore the testator's domicile must be considered in Waterville, for the purpose of settling his estate, unless he had not only abandoned it, but had actually acquired a new domicile in New York.

It appears in evidence that he commenced business in New York about 1831, at first being there transiently; that in 1836 or 1837, having been married a second time, he was in the habit of spending considerable time there with his family at the Astor House, and other

changed. Are there any facts that should make this case an exception to the rule?

The testator continued to vote in Waterville about one half of the time. There is no evidence that he ever voted in New York. His manner of life there, boarding generally at hotels, where he always registered his name as from "Maine," renders it probable that he never claimed or was admitted to be a voter in that city.

He paid a tax upon personal as well as real estate in Waterville, a few of the years after he went into business in New York. He does not appear ever to have paid any tax in the latter place but one year. He evidently belonged to that class of men, fortunately small in number, who have no stronger desire than to avoid the payment of taxes anywhere.

These facts have little tendency to establish anything but the intention of the testator. Residence, being a visible fact, is not usually in doubt. The intention to remain is not so easily proved. Both must concur in order to establish a domicile. *Harvard College v. Gore*, 5 Pick. 370. And, as both are known to be requisite in order to subject one to taxation, or to give him the right of suffrage, any resident who submits to the one, or claims the other, may be presumed to have such intention. Both parties claim that the will itself furnishes evidence of the testator's domicile. At most, it can be of little weight, except on the question of his intention. Such intention must relate to the future and not to the past. A will made at or near the close of life will not be likely to throw much light on that question. It must be an intention to reside. An intention to dispose of his property according to the laws of any place, does not tend to fix the testator's domicile there. So that, if the will is made in conformity with our laws, and even if, as is contended, some of its provisions would be void by the laws of New York, that cannot affect the question of domicile. *Hoskins v. Matthews*, 35 Eng. Law and Eq. 532; *Anstruther v. Chalmers*, 2 Simons, 1. Nor, on the other hand, does the fact that he described himself, in the will, and in the codicil, as "of the city and State of New York," make any material difference. *Whicker v. Hume*, 5 Eng. Law and Eq. 52.

During the last twenty years of the testator's life, his ruling purpose seems to have been to accumulate property abroad, and escape taxation there and at home. This led him to sacrifice, to a large extent, the enjoyments of domestic life, and to sever or neglect all those social ties which might have given him position and influence in the community. He pursued this process of isolation, because, while it did not interfere with his gains, it diminished his expenses. This was what rendered his domicile a question of doubt. This is what gives to the testimony, as it gave to his life, an aspect of inconsistency and contradiction. But through it all there is apparent an intention to retain his home in Waterville, as a place of retreat for himself during life, and a place of residence for his family after his

decease. He never had any such home elsewhere. And, upon the whole evidence, we are satisfied that his domicile was never changed. The decree of the Probate Court is affirmed, with costs for the appellees.¹

WILBRAHAM v. LUDLOW.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[*Reported 99 Massachusetts, 587.*]

FOSTER, J.² The question in the present case was, whether the pauper, whose settlement was once in the plaintiff town of Wilbraham, had acquired a new settlement in Ludlow. The burden of proof to establish this was on the plaintiffs. After the presiding judge had announced the rule of law which he deemed to govern the case, and the instructions which he proposed to give to the jury, the plaintiffs declined to argue the case, submitted to a verdict for the defendants, and alleged exceptions. Under these circumstances, the only question open for revision is the correctness of the rulings. The evidence is not for the court to pass upon, and is reported only to make the instructions intelligible and enable us to judge better whether they were pertinent and accurate.

The pauper leased his house in Ludlow in June, 1857, and never lived in it again. He remained in that town, working as a laborer, until August in that year. He then went to his brother's house in Wilbraham, and afterwards worked about, as a day laborer, in the towns of Wilbraham, Springfield, and Ludlow, till October, 1861, after which he remained in Wilbraham in the family of Horace Clark, who was about that time appointed his guardian, until he was committed as an insane pauper to the hospital at Northampton. The proposition to be maintained by the plaintiffs was, that after August, 1857, he continued to reside in Ludlow within the meaning of the pauper laws; so that a settlement in that town could be subsequently acquired. There was certainly no actual continuance of his former home in that town; it was broken up and he had abandoned it, apparently without any intention to return there to live. But the argument for the plaintiffs is, that the pauper's domicile remained in Ludlow until he acquired a new one in some other town, and that, while absent in fact, he continued to live there in contemplation of law, and by such constructive residence the prescribed period for acquiring a settlement was completed.

Assuming that this view of the law is correct, and that domicile and residence are identical under the pauper laws, we are nevertheless of opinion that the rule of law stated to the jury was correct. If, from

¹ *Acc. Somerville v. Somerville, 5 Ves. 750; Harvard College v. Gore, 5 Pick. 370.*
— Ed.

² The opinion only is given: it sufficiently states the case. — Ed.

the time the pauper left Ludlow in August, 1857, he had "no opinions, desires, or intentions in relation to residence, except to have a home wherever he worked," then he did have in each successive town where he lived as a laborer a home and domicile so long as he remained there. It must be borne in mind that this was the case of one who had abandoned his former dwelling-place, either with no intention of return, or at the most with such vague, indefinite, and remote purposes in this respect that they would not prevent him from readily acquiring a new domicile wherever he might go. The person was a day laborer without family, separated by judicial decree from his wife. Such a man, so situated, when he is laboring in one town with no other intention as to residence except to have a home wherever he works, may well be deemed to live there with the purpose of remaining for an indefinite period of time, and thus to have there all the home he has anywhere, as much of a domicile as such a wanderer can have. At least it was competent for the jury to come to that conclusion; and the instructions under which they did so were unobjectionable.

It is unnecessary to attempt a precise definition of the term domicile, as to which that eminent English judge, Dr. Lushington, has said that, "although so many powerful minds have been applied to the question, there is no universally agreed definition of the term, no agreed enumeration of the ingredients which constitute domicile." *Maltass v. Maltass*, 1 Rob. Ecc. 74. Story Conf. Laws, c. 3. Our own adjudged cases sufficiently establish the rule that one who is residing in a place with the purpose of remaining there for an indefinite period of time, and without retaining and keeping up any *animus revertendi*, or intention to return, to the former home which he has abandoned, will have his domicile in the place of his actual residence. *Sleeper v. Paige*, 15 Gray, 349; *Whitney v. Sherborn*, 12 Allen, 111. Where the question is one of national domicile, this statement may not be correct; for such a condition of facts might not manifest an intention of expatriation. But it is accurate enough for cases like the present, which relate to a change of domicile from one place to another within the same Commonwealth.

*Exceptions overruled.*¹

Rule

BANGS v. BREWSTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[Reported 111 Massachusetts, 382.]

MORTON, J.² The question at the trial was whether the plaintiff had on May 1, 1869, acquired a domicile in Orleans. There is no doubt as

¹ "A sea captain, who has neither domicile nor residence abroad, whose domicile of origin, being abandoned long ago, without intention of returning, should be considered as lost, and who has no residence except on the steamer which he commands, is in the eye of the law, for the purpose of service of process on him, domiciled in the port where his vessel is moored at the time of service."—Court of Ghent (1891), 21 Clunet, 584. But see *Boothbay v. Wiscasset*, 3 Me. 354. — Ed.

² Part of the opinion only is given. — Ed.

to the rule of law that the plaintiff's domicile of origin in Brewster adhered to him until he had acquired a domicile somewhere else, and that in order to effect a change of domicile he must not only have had the intent to make his home in some other town, but he must in fact have made his home there. The intent and the act must concur, and until the intent was consummated by an actual removal of his home, no change of domicile was effected. *Whitney v. Sherborn*, 12 Allen, 111. *Carnoe v. Freetown*, 9 Gray, 357.

The question is as to the application of this rule to the facts of this case. The plaintiff was a shipmaster, most of whose time was spent at sea. He went to sea in November, 1867, taking his wife with him, and in December, 1868, he sent his wife to Orleans, and she arrived there in February, 1869. He did not arrive at Orleans until July, 1869, so that he was not personally present in Orleans on May 1, 1869. The special findings of the jury settle conclusively that when he went to sea in November, 1867, he had the definite intent to make Orleans his home, and that in December, 1868, he sent his wife to Orleans in pursuance of that intent. We think the jury were justified in finding that his domicile was in Orleans on the first of May.

By sending his wife to Orleans with the intent to make it his home, he thereby changed his domicile. The fact of removal and the intent concurred. Although he was not personally present, he established his home there from the time of his wife's arrival.¹

DUPUY v. WURTZ.

COURT OF APPEALS, NEW YORK. 1878.

[Reported 53 *New York*, 556.]

RAPALLO, J.² When Mrs. Wurtz went to Europe with her husband, in 1859, she was domiciled in the city and State of New York. She and her husband were natives of the United States. It does not appear in the case that she ever had had any domicile except in this State, and it seems to be conceded on both sides that this was her domicile of origin.

¹ *Acc. Anderson v. Anderson*, 42 Vt. 350. *Contra*, *Hart v. Horn*, 4 Kan. 232. In *Porterfield v. Augusta*, 67 Me. 556 (1877), it was held that the husband's domicile could not thus be changed if the wife's removal was without his prior consent. See further, *Fayette v. Livermore*, 62 Me. 229. If the wife removes, the husband remaining at the old domicile, their domicile is of course not changed. *Scholes v. Murray Iron Works Co.*, 44 Ia. 190. And the fact that a man's family is settled in a certain place (though *prima facie* evidence that he is domiciled there, *Brewer v. Linnaeus*, 36 Me. 428) is consistent with his being domiciled elsewhere. *Greene v. Windham*, 13 Me. 225; *Cambridge v. Charlestown*, 13 Mass. 501; *Hairston v. Hairston*, 27 Miss. 704; *Pearce v. S.*, 1 Sneed. 63. — ED.

² Only so much of the opinion as deals with the question of domicile is given. — ED.

It is not pretended that she or her husband had abandoned their domicile in New York up to the time of his death in Europe in 1861; and from the evidence, which we have carefully examined, but do not consider it necessary to recite in detail, we are clearly of opinion that, up to the fall of 1868, she had not for a moment relinquished her intention and expectation, often declared orally, and in her written correspondence, of returning to her home in New York as soon as the condition of her health should permit; that her sojourn in Europe was compulsory, being caused by ill health and the advice of her physician that she was not physically able to bear the voyage and the excitement which would await her on her return; that she had not acquired any domicile abroad, and up to the time of the execution of the will in question, November 21, 1868, she continued to be a citizen of this State.

But it is claimed on the part of the contestants that although it should be conceded that she was a citizen of New York at that time, and then intended to return, she changed her intention, after executing the will, and acquired a domicile at Nice, and that this change destroyed the validity of the will, it not having been executed according to the laws of France. This is the only branch of the case which presents questions of difficulty.

The counsel for the contestants is sustained by authority in the position that the domicile of the testatrix at the time of her death, and not at the time of the execution of the will, is the material inquiry; and that as to personal property, the question of intestacy, or of the valid execution of her will, depends upon the law of the place where she was domiciled at the time of her death. This question was decided after much discussion, and notwithstanding the dissents of three eminent judges of this court, in the case of *Moultrie v. Hunt*, 23 N. Y. 394.

In England, the embarrassments likely to arise from such a rule are now obviated, as to British subjects, by the Act of Parliament of 24 and 25 Victoria, chapter 114, 1861-2, which provides in substance, as to wills made after the passage of the act, that wills of personal estate made out of the United Kingdom by a British subject shall be deemed well executed, whatever may be the domicile of the testator at the time of making the will, or of his death, if made according to the forms required by the law of the place where made, or of the place of the domicile of the testator at the time of making the will, or of the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin. Also, that no subsequent change of domicile shall affect the validity or construction of the will. This enactment substantially conforms the law of England to that which generally prevails in continental Europe. We have no such statute, and must therefore follow the rule laid down in *Moultrie v. Hunt*, and hold that if at the time of her death, January 8, 1871, Mrs. Wurtz had changed her domicile and ceased to be a citizen of

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this State, her will is not valid here, unless it would be valid according to the law of the place of her domicile at the time of her death. (See also 1 Brad. 69; Story Conf. Laws, § 473.) The important question, therefore, is whether the evidence establishes such a change of the domicile of the testatrix as is alleged by the contestants.

A reference to some of the elementary principles governing questions of domicile will facilitate this inquiry.

One leading rule is that for the purposes of succession every person must have a domicile somewhere, and can have but one domicile, and that the domicile of origin is presumed to continue until a new one is acquired. (*Somerville v. Somerville*, 5 Ves. 750, 786, 787; Story, Conf. Laws, § 45; *Abington v. N. Bridgewater*, 23 Pick. 170; *Graham v. Pub. Admr.*, 4 Brad. 128; *De Bonneval v. De Bonneval*, 1 Curteis, 856; *Attorney-General v. Countess of Wahlstatt*, 3 Hurl. & Colt. 374; *Aikman v. Aikman*, 3 McQueen, 855, 863, 877.)

The statute of New York of 1830, 2 Stat. at Large, p. 69, § 69a, referred to by the learned counsel for the contestants, does not affect this principle, nor does it aid in determining whether Mrs. Wurtz had lost her domicile or citizenship in New York.

The object and effect of this act are fully explained in *Matter of Catharine Roberts' Will*, 8 Paige, 525, 526; *Isham v. Gibbons*, 1 Bradf. 69; 4 Bradf. 128.

To effect a change of domicile for the purpose of succession there must be not only a change of residence, but an intention to abandon the former domicile, and acquire another as the sole domicile. There must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile. Residence alone has no effect *per se*, though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two taken together do constitute a change of domicile. (*Hodgson v. De Beauchesne*, 12 Moore P. C. Cases, 283, 328; *Munro v. Munro*, 7 Cl. & F. 877; *Collier v. Rivaz*, 2 Curteis, 857; *Aikman v. Aikman*, 3 McQueen, 855, 877.) This rule is laid down with great clearness in the case of *Moorhouse v. Lord*, 10 H. L. 283, 292, as follows: Change of residence alone, however long continued, does not effect a change of domicile as regulating the testamentary acts of the individual. It may be, and is, strong evidence of an intention to change the domicile. But unless in addition to residence there is an intention to change the domicile, no change of domicile is made. And in *Whicker v. Hume*, 7 H. L. 139, it is said the length of time is an ingredient in domicile. It is of little value if not united to intention, and is nothing if contradicted by intention. And in *Aikman v. Aikman*, 3 McQueen, 877, Lord Cranworth says, with great conciseness, that the rule of law is perfectly settled that every man's domicile of origin is presumed to continue until he has acquired another sole domicile with the intention of abandoning his domicile of origin;

that this change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts the change.

The question what shall be considered the domicile of a party, is in all cases rather a question of fact than of law. (*Bruce v. Bruce*, 6 Bro. Par. C. 566.) With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case, and each case must vary in its circumstances; and moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight. (12 Moore Priv. C. C. 330.)

In passing upon such a question, in view of the important results flowing from a change of domicile, the intention to make such a change should be established by very clear proof (*Donaldson v. McClure*, 20 Scotch Session Cases, 2d series, 321; S. C. aff'd, 3 McQueen, 852), especially when the change is to a foreign country. (*Moorhouse v. Lord*, 10 H. L. 283.)

The intention may be gathered both from acts and declarations. Acts are regarded as more important than declarations, and written declarations are usually more reliable than oral ones.

The principal if not the only act done by Mrs. Wurtz, in 1868, bearing upon the question of an intention to abandon her domicile in New York, consisted in her letting her house in Fifth Avenue to Mr. Gray in that year. This house she had kept unoccupied during all her stay abroad up to that time, and it is to be observed that in letting it to Mr. Gray, the testatrix reserved one room for the storage of some of her effects. In all other respects she continued to live after 1868, as she had done during the preceding nine years, dwelling all the time in hotels, passing her winters at Nice, and during the residue of the year travelling on the continent and in England. Nice had for many years been her headquarters. She there retained one room in the hotel for the storage of such personal effects as she did not desire to take with her upon her travels. The same reasons which had theretofore prevented her from returning to what she invariably called her home, still continued to exist. She had failed to recover the health of which she was in pursuit, and her physicians still continued to advise her that her health would not permit her to make the voyage home. But up to the time of her death she retained her property and investments in this State, made no investments abroad, did not purchase or even hire a permanent place of residence, and lived continually in hotels.

But after the execution of the will there was a change in the tenor of her correspondence, and in some of her oral declarations on the subject of returning to what she still continued to call her home, and it is upon these declarations that the contestants' case principally rests. In all her correspondence, up to the time of the making of the will, whenever the subject was alluded to, she had clearly exhib-

ited not only an intention, but a determination and expectation of returning as soon as her health should permit, and in many instances she had mentioned a definite period for the continuance of her sojourn abroad, and in others down to October, in 1868, she placed the continuance of her stay upon the ground that her physicians would not permit her to return.

On the 20th of April, 1868, she wrote to Mr. Seymour: "Dr. Pantaleone has told me very plainly that he cannot permit me to cross the Atlantic; that I have no strength to combat a voyage, and all the trials that are to meet me on my arrival. So here I am." On the 29th of September she again writes: "In fact with that and other troubles I have been ill, and have been put back three years in my convalescence. Now I never expect to be well." And on the 3d of October, 1868, she says to Mrs. Seymour: "But my nervous system has been shattered, and after the experience of the past year (in heavy trials) I see why my physicians have not wished me to go home. . . . Do you not think my articles ought to be in one place, except the silver?"

The first letter of all the series in evidence, bearing upon the question of an abandonment of the intention to return, was written on the 21st of November, 1868, the very day of the execution of the will. It is addressed to Mrs. Seymour. In it the testatrix says: "I am now in Dr. Pantaleone's care, and find all three physicians, Dr. Vallery in Rome, Dr. Mannoire in Geneva, and Dr. Pantaleone, agree that it is rest and tranquillity of mind is very important to me. Many thanks for your kind wishes. But except to see a few friends I have no inducement to return to America. My nerves would not endure the shock, and it is plain that my life is more quiet here. But I do not intend to expatriate myself, and hold firmly to my allegiance to my beloved country." In her will, bearing date the same day, she makes the following declaration: "As I have for several years resided in Europe, sojourning now at one place, and now at another, as my health and comfort have required, I deem it proper for me here to say, that I consider my home and residence as still being in the city of New York, in my beloved country, the United States of America." August 5th, 1869, from Geneva she writes to Mrs. Seymour as follows: "I think Charles is staying in Europe on my account, and I never expect to return. But I feel badly at any sacrifice for me. But Dr. Pantaleone is correct. Any moral excitement upsets me away from turbulent spirits, and there is much to worry me at home." And on the 13th of October, 1870, the last date of the series of letters in evidence, she writes to Mrs. Courtney: "I never can live in a cold climate again, and the few years I have to live, I want to live in comfort and repose."

These are all the written declarations of the testatrix bearing upon the question. There was also evidence of oral declarations, but they do not throw any additional light upon the intentions of the testatrix.

Mary Brown, a colored servant, who was in the service of the deceased during all her stay in Europe, testified that she always said, of late years, that she never would return to America. That the doctors told her she was not able to come, and, finally, she gave it up, and said she would not come. Mrs. Slemmer testified that, at Geneva, in the summer of 1870, Mrs. Wurtz said to her, "I know when I am well off, indeed I am not going back; I should never have any comfort if I did." She said she had no intention of returning, and had let her house and disposed of her furniture. Mr. Sandford testified that he had frequently spoken to her of her returning to America, and her reply invariably was that she could not come, that her health would not admit of it. Mr. Gray and Mr. Aldis testified substantially to the same effect.

This is, in substance, all the evidence in the case tending to show a change of domicile. The present is one of the exceptional cases in which the duty devolves upon this court to pass upon the facts as well as the law. And we think that the conclusion of fact, fairly to be drawn from all the evidence, is that the testatrix, after having long and consistently entertained the intention of returning, had finally become satisfied that the state of her health and nerves was such that she would be unable to return to her home, and would, in all probability, die abroad. At the same time it establishes no intention to adopt a foreign domicile, but that she desired and claimed to retain her domicile of origin, and to have her estate administered according to the laws of the State of New York. This, the learned counsel for the contestants contends, the law would not permit her to do. That her long-continued stay in Europe, in connection with her final abandonment of the idea of returning to New York; her dwelling, during the winter of each year, at Nice, furnishing, in part, the rooms which she occupied in the hotel; the removal to that place of a portion of her personal effects, her hiring an apartment in the hotel by the year for the storage of such articles as she did not carry with her on her summer travels, and always returning to the same place, afforded such clear evidence of the abandonment of her domicile in New York, and adoption of a new domicile at Nice, that no claim on her part to continue to be considered a citizen and resident of New York could preserve her domicile of origin; and he has cited numerous authorities in support of these positions.

An examination of these authorities will show that they proceed upon the ground that the person whose domicile was in question had actually settled in a new residence, with the intention of making it a permanent home; that this intention was manifested by unequivocal acts which outweighed any declarations to the contrary, and the intention was found as matter of fact.

The principal cases referred to in this connection are *Stanley v. Bernes*, 3 Hagg. Ecc. R. 373; *In re Steer*, 3 H. & N. 594; *Anderson v. Laneville*, 9 Moore Priv. C. Cases, 325; *Hoskins v. Mat-*

thews, 35 Eng. L. & Eq. 540; Whicker v. Hume, 13 Beav. 384; 7 H. L. 124; Hegeman v. Fox, 31 Barb. 475; Ennis v. Smith, 14 How. U. S. 423.

In *Stanley v. Bernes*, the testator, a British subject, had been naturalized in Portugal, and the point decided was that a British subject might acquire a domicile abroad (a proposition which had been disputed, *Curling v. Thornton*, 2 Addams' R. 19), and that his claim to be considered a British subject did not destroy his foreign domicile. *In re Steer*, the testator had resided many years in Hamburg, and had been regularly constituted a burgher of that city to enable him to trade there. In his will, made while on a visit to England, he recited those facts, and his intention to return to Hamburg, and at the same time declared that he did not mean to renounce his domicile of origin as an Englishman. The court in that case conceded the principle of law that the domicile of origin continued until the testator had manifested an intention of abandoning it and acquiring another as his sole domicile, but held that there was evidence of such an intention, and decided, as matter of fact, that he had elected Hamburg as his domicile; that he thereby necessarily gave up his English domicile, as he could not retain both, and that the declaration in his will was unavailing. In *Anderson v. Laneville* the testator's domicile of origin was in Ireland. He had incontestably changed his domicile to England. He afterwards broke up his establishment in England and moved to France, where he bought and furnished a house, in which he resided permanently for thirteen years. The contest was between his English and French domicile, and was decided as a question of fact. In *Hoskins v. Matthews*, the decedent was held to have acquired a domicile in Tuscany by residence, the purchase of a villa and the establishment of his family there. Notwithstanding his continued attachment for his native country, and his often expressed desire to return there, and the fact that he was obliged, by his health, to live in a milder climate than that of his birth, the fact being established that he had formed the intention of permanently changing his domicile, the court held that the change was not the less effectual because induced by motives of health; at the same time admitting that even a permanent residence in a foreign country, occasioned by the state of health, may not operate as a change of the domicile, and that every case must stand upon its own circumstances.

In *Whicker v. Hume*, 13 Beav. 384, and 7 H. L. 124, the domicile of origin of the testator was in Scotland. The evidence of an abandonment of that domicile, and the adoption of a domicile in England was clear. Afterward he went to France, leaving some of his property in England, which he desired a friend to keep for him until his return. He died in Paris, having just made a will in the English form, which was sustained.

The Scotch domicile was regarded as entirely out of the question, and the contest was between the English and French domicile. (7 H. L. 139.)

In *Hegeman v. Fox*, much relied upon by the contestants, the question was whether the testator was at the time of his death domiciled in Florida. He was a native of Massachusetts, had been domiciled in New York, afterward in Williamsburgh, and then removed to Florida. There was no evidence of any intention to retain his domicile in Williamsburgh, and the opinion of the court was that the weight of the evidence established that he neither expected nor intended to return to the Northern States. He purchased a plantation in Florida, stocked it, and furnished his house, went to housekeeping, entered into the business of planting, and made other family arrangements looking to a permanent residence there. Upon these facts it was held that the circumstances that this change of residence was induced by considerations of climate and health, and that domestic troubles intervening induced the expression of an intention to return to New York, did not overcome the effect of his acts, which clearly indicated an intention to make his permanent home in Florida. The case is well reasoned in the opinion of the court, and does not conflict in principle with the result at which we have arrived, but depends upon its own peculiar circumstances.

In *Ennis v. Smith* the question was whether General Kosciusko had acquired a domicile in France. He left Poland voluntarily, came to this country, and afterward went voluntarily to France, where he lived for fifteen years. He could have returned to Poland at any time. He was made a French citizen by decree of the national assembly, of which privilege he could not avail himself unless he became domiciled in France. Residence was, in that case, said to be *prima facie* evidence of domicile, and the facts were held to establish a domicile in France.

In all these cases it was upon the ground of a clearly proved voluntary and intentional acquisition of a foreign domicile that the courts held the former domicile abandoned.

The late cases of *Jopp v. Wood*, [1864] 34 L. J. Eq. 212, and *Moorhouse v. Lord*, 10 H. L. 284, proceed upon the ground that in order to acquire a new domicile there must be an intention to abandon the existing domicile. All the authorities agree that to effect a change of domicile there must be an intention to do both. Some of them hold that the intention to do one implies an intention to do the other. But in all the cases the question of intention is treated as one of fact, to be determined according to the particular circumstances of each case. (See also *Douglas v. Douglas*, Law Rep. 12 Eq. 617, 647; *The Attorney-General v. The Countess de Wahlstatt*, 3 Hurl. & Colt. 374; *Udny v. Udny*, L. R. 1 Scotch App. 441, 1070; *White v. Brown*, 1 Wallace, Jr. 217.)

In the present case we find no sufficient evidence of an intention to adopt Nice or any other place as a permanent home or domicile. The plans of the testatrix after November, 1868, so far as disclosed, had reference to failing health and an apprehension that she might not

long survive, rather than to adopting and settling in a new home. If she chose to be a wanderer during the short period of life which she supposed might still remain to her, she would not thereby, as respects her succession, lose her domicile of origin. (*Attorney-General v. Countess of Walsstatt*, 3 H. & C. 374; *White v. Brown*, 1 Wall., Jr. 217.)

Her long residence abroad, upon which the contestants rely, is not very significant in this case, as during by far the greater part of that time, in fact during all except about two and a quarter years before her death, she was clearly shown to be a mere sojourner in Europe, intending and fully expecting to return, and retaining her house in New York; and all the acts relied upon to show the acquisition of a domicile in Nice were done during that period, and while there can be no doubt of her continuing to be a citizen of New York. Her habit of spending her winters in Nice, her furnishing her rooms, hiring a store-room at the hotel, the bringing out there of her nick-nacks as they are called, were all before she had given any evidence of the relinquishment of her plan of return, and while she still retained her house in Fifth Avenue, New York. The only evidence of any change consists in her declarations. These indicate no intention to settle permanently in any particular place, and are clearly contradictory of any intention to abandon her domicile in New York. A mere declaration of intention not to return is not conclusive as to a change of domicile. As well expressed by Lord Kingsdown in *Moorhouse v. Lord*, 10 H. L. 293: "I can well imagine a case in which a man leaves England with no intention whatever of returning, but with a determination and certainty that he will not return." He then supposes the case of one laboring under a mortal disease, whose physician advises him that his life may be prolonged or his sufferings mitigated by a change to a warmer climate, and says that to hold that he cannot do that without losing his right to the intervention of the English laws as to the transmission of his property after his death, would be revolting to common sense and the common feelings of humanity. (See S. C. p. 283, per Lord Cranworth; *Story Conf. Laws*, §§ 45, 46; *Guthrie's Savigny*, 62, 63; *Munro v. Munro*, 7 Cl. & Fin. 842, 876; 1 Rob. Ecc. R. 606; 2 Hurl. & Colt. 982; 3 id. 374.)

Unless a new domicile was acquired, as has been already shown, the domicile of origin continues, and must govern, else there would be no law according to which the estate could be administered, especially in a case of intestacy.¹

¹ *Acc. Moorhouse v. Lord*, 10 H. L. C. 272. See *Johnstone v. Beattie*, 10 Cl. & F. 42. So domicile is not necessarily changed by an absence, however long continued, for pleasure, travel, etc.: *Culbertson v. Floyd County*, 52 Ind. 361; *Sears v. Boston*, 1 Met. 250; *Cadwalader v. Howell*, 18 N. J. L. 138. Nor by absence merely for business: *Easterly v. Goodwin*, 35 Conn. 279; *Greene v. Greene*, 11 Pick. 410; *Hallet v. Bassett*, 100 Mass. 167; *S. v. Dayton*, 77 Mo. 678; see *Jopp v. Wood*, 34 Beav. 88. Nor by

HARRAL v. HARRAL.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1884.

[Reported 39 *New Jersey Equity*, 279.]

DEPUE, J.¹ The domicile of the testator's parents, at the time of his birth, was in Bridgeport, Connecticut. That was his domicile of origin. His father died in 1862. In 1865 the family residence in Bridgeport was sold, and in 1866 his mother removed to New York with all the family, except one son, who was married, and had his household in Bridgeport. The mother rented a house in New York as a residence for herself and the family, which they occupied until her death in December, 1867. After his mother's death, the testator resided in New York City with his brother, until he was appointed house-surgeon in the New York Hospital, and had his residence in the hospital until he went to Europe in August, 1869.

The decedent went abroad for the purpose of acquiring the German language and continuing his professional studies. In 1869 he was in Paris temporarily, and in the fall of that year left Paris for Germany, where he remained about two years. He then went to Paris again, and resided there in No. 8 Rue de la Sorbonne, known as the Latin Quarter. In 1872, he became acquainted with the complainant, who lived with him as his mistress at No. 8 Rue de la Sorbonne until they were married on the 20th of February, 1877. Immediately after their marriage they began housekeeping in a house rented by him at Suresnes, a village a short distance from Paris. He had a lease of the house for two years, and he and his wife continued to occupy it until his return to America, in May, 1878. He seems to have been attached to his wife. In May, 1877, he wrote to Mr. Wallis, announcing his marriage, and said he was "happy and contented." The facts connected with the residence of the decedent at Suresnes are fully stated in the opinion of the chancellor, and need not be repeated here. The chancellor, from the testimony, concluded that the decedent had settled himself in France to live there, and make it his home. The circumstances under which he was brought to America are also detailed in the chancellor's opinion. They show no intention on the part of the decedent to make any change at that time in his domicile. The evidence is quite to the contrary.

A person *sui juris* may change his domicile as often as he pleases. To effect such a change, naturalization in the country he adopts as his

absence as a volunteer soldier : *S. v. Judge*, 13 Ala. 805 ; *Brewer v. Linnaeus*, 36 Me. 428. Nor by absence to hold public office : *Dennis v. S.*, 17 Fla. 389 ; *Walden v. Canfield*, 2 Rob. (La.) 466 ; *Venable v. Paulding*, 19 Minn. 488 ; *Hannon v. Grizzard*, 89 N. C. 115. But in cases of this kind the domicile will of course be changed if the requisite intent exists. *Doucet v. Geoghegan*, 9 Ch. Div. 441 ; *Moor v. Harvey*, 128 Mass. 219 ; *Wood v. Fitzgerald*, 8 Or. 568. — ED.

¹ Only so much of the opinion as discusses the question of domicile is given. — ED.

domicile is not essential. He need not do all that is necessary to divest himself of his original nationality. There must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the *factum* of residence there must be added the *animus manendi*; and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home. *Haldane v. Eckford*, L. R. 8 Eq. 631; *King v. Foxwell*, L. R. 3 Ch. D. 518; *Lord v. Colvin*, 5 Jur. (N. S.) 351; *Aikman v. Aikman*, 7 Id. 1017, 1019; *Douglas v. Douglas*, L. R. 12 Eq. 617, 644; *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Cadwalader v. Howell*, 3 Harr. 144, 145.

We think the evidence proves that the testator's domicile, arising from the *factum* of residence and the *animus manendi*, was, at the time of his death, by the *jus gentium*, in France.

But it is contended that, inasmuch as the decedent never obtained an authorization from the French government, he was incapable, by the law of that country, of acquiring a domicile in France, and that therefore his domicile of origin, or his domicile before he took up his residence in France, either revived, or, by the French law, would govern, in the disposition of his personal estate if it was administered upon in France. Article XIII. of the Code Napoleon is relied on to sustain this contention. That article is in these words: "The foreigner who shall have been admitted by the government to establish his domicile in France shall enjoy in that country all civil rights so long as he shall continue to reside there."

It appears from the evidence that the authorization contemplated by this article of the Code is obtained by an application to the head of the government, and is attended with formalities almost as solemn as those required for naturalization in France.

The construction of this article was before the English courts in *Bremer v. Freeman*, 10 Moore P. C. 306, and *Hamilton v. Dallas*, L. R. 1 Ch. D. 257, and was somewhat considered in the New York Court of Appeals in *Dupuy v. Wurtz*, 53 N. Y. 556. In *Bremer v. Freeman* it was held that, if by the *jus gentium* the decedent, who was an English woman by birth, was *de facto* domiciled in France, the authorization of the French government was not necessary to confer upon her the right of testacy, and that her will, not executed in conformity with the French law, was invalid. In *Hamilton v. Dallas*, Vice-Chancellor Bacon held that a *de facto* domicile, governing the succession of the personal estate of a decedent, might be acquired by a foreigner resident in that country who had not obtained the government authorization required by Article XIII. of the French Code, as the condition for the enjoyment by a foreigner resident in that country of full civil rights. The learned judge who prepared the opinion in *Dupuy v. Wurtz* expressed a contrary opinion, but the case did not call

for a decision on that point. The counsel of the defendants have produced several decisions of the French courts which hold that, in cases of intestacy, the inheritance of a foreigner domiciled *de facto* in France will not be distributed under the French law unless he shall have obtained the authorization required by Article XIII. of the Code. Pepin's Case, decided in 1868; Melizet's Case, decided January, 1869; Ott's Case, decided January, 1869; Forgo's Case, decided in 1875; and Cuirana's Case, decided in 1881. It will be observed that all these cases relate to the transmission of property by inheritance, or by testamentary disposition. They do not touch the question in controversy in this case. The complainant does not claim the property in dispute by any right of succession, nor does she dispute the validity of the testator's will, as not being executed according to the laws of France. The claim she makes to the one half of the personal property of her deceased husband she founds upon the marriage in France, and the incidents of the married relation, in virtue of which she claims that, by the French law, she became thereby *ipso facto* entitled to that share in his movable property.

The French jurists recognize a distinction between such a legal domicile as a foreigner can acquire by fulfilling the requirements of Article XIII. of the Code, and will entitle him to all the civil rights of native-born Frenchmen, and a domicile, in fact, which is acquired by a residence without compliance with any legal formalities. The right of a foreigner to contract a lawful marriage is not made to depend on the observance of such forms as are necessary to the acquisition of citizenship; it is given on the sole condition of six months' residence by either of the parties. Article LXXIV. of the Code provides that "the marriage shall be celebrated in the commune in which the one or the other of the parties shall be domiciled," and declares that "this domicile shall be established by six months' continued habitation within the same commune." These conditions were fulfilled, and the marriage was lawfully celebrated under the French law.¹

BORLAND v. BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[Reported 132 Massachusetts, 89.]

LORD, J.² The evidence tended to show that the plaintiff was born in Boston in 1824, and had lived there until June, 1876, when he sailed for Europe with his family. He testified that when he left Boston he had definitely formed the intention of not returning to Boston as a resident; that in the fall of 1876 he had decided to make Waterford,

¹ *Acc. Collier v. Rivaz*, 2 Curt. Eccl. 855. — Ed.

² Part of the opinion, dealing with a different question, is omitted. — Ed.

Connecticut, his residence, and then formed the intention of purchasing land there, which he bought on May 28, 1877; and that he remained in Europe until 1879, when he returned to this country, and went to Waterford. On this evidence, the judge instructed the jury, "that a citizen, by the laws of this Commonwealth, must have a home or domicile somewhere on the first day of May for the purpose of taxation; that in order to change such home or domicile, once acquired, and acquire a new one, the intention to make the change and the fact must concur; that if the plaintiff, with no definite plan as to the length of time he should remain abroad, and no definite purpose about a change of domicile, went to Europe with his family, that would not effect a change of his domicile from Boston, and he would remain liable to taxation there; but that if he left Boston in 1876 with his family to reside in Europe for an indefinite length of time, with the fixed purpose never to return to Boston again as a place of residence, and with the fixed purpose of making some place other than Boston his residence whenever he should return to the United States, and had in his mind fixed upon such place of residence before May 1, 1877, and remained in Europe until after that time, he was not liable to this tax as an inhabitant of Boston on the first of May of that year; that whether he had done enough to make Waterford his home or not, was not essential in this case, — if he had lost his home in or ceased to be an inhabitant of Boston at the time, he was not taxable there."

Certainly, the latter part of this instruction would be understood to be in conflict with the former; for, not referring now to the words used by the judge, the obvious meaning of the whole sentence is, first, to instruct the jury that a man once having a home here is taxable here until both the purpose to change his home and the fact of changing his home concur; and afterwards to instruct them that, if his intention to make another place his home is formed after he leaves this country, and before the first of May, such intention removes his liability to taxation, even although the fact of change does not concur with the intention. Although there is this obvious inconsistency, it arises partly from inherent difficulties in the case, partly from the impossibility of stating a fixed rule which shall be applicable to all cases, under the infinite variety of circumstances attending them, and the various adjudications which have been made upon the subject. The source of the difficulty is in the use of words of exactly, or substantially, or partially, the same signification, but at different times used with different significations.

There are certain words which have fixed and definite significations. "Domicile" is one such word; and for the ordinary purposes of citizenship, there are rules of general, if not universal acceptance, applicable to it. "Citizenship," "habitation," and "residence" are severally words which may in the particular case mean precisely the same as "domicile," but very frequently they may have other and

inconsistent meanings; and while in one use of language the expressions a change of domicile, of citizenship, of habitancy, of residence, are necessarily identical or synonymous, in a different use of language they import different ideas. The statutes of this Commonwealth render liable to taxation in a particular municipality those who are inhabitants of that municipality on the first day of May of the year Gen. Sts. c. 11, §§ 6, 12. It becomes important, therefore, to determine who are inhabitants, and what constitutes habitancy.

The only case adjudged within this Commonwealth, in which the word of the statute, "inhabitant," is construed to mean something else than "being domiciled in," is *Briggs v. Rochester*, 16 Gray, 337, although that decision is subsequently recognized in *Colton v. Longmeadow*, 12 Allen, 598. In *Briggs v. Rochester*, Mr. Justice Metcalf, in speaking of the word "inhabitant," says that it has not the meaning of the word "domicile" "in its strictly technical sense, and with its legal incidents." He says also that the word "domicile" is not in the Constitution nor in the statutes of the Commonwealth. So far as the Constitution is concerned, this is correct, but he had evidently overlooked a statute of ten years before, in which the word "domicile" was used, and upon the very subject of taxation, in a proviso in these words: "Provided that nothing herein contained shall exempt said person from his liability to the payment of any tax legally assessed upon him in the town of his legal domicile." St. 1850, c. 276. Gen. Sts. c. 11, § 7. This language is a strong legislative assertion that domicile is the test of liability to taxation; and in an opinion given by the justices of this court to the House of Representatives in 1843, in reference to a student's right to vote in the municipality in which he is residing for the purposes of education, it was said, "And as liability to taxation for personal property depends on domicile." 5 Met. 587, 590.

Nor do we think that the opinion in *Briggs v. Rochester* gives the true force as used in the Constitution of the word "inhabitant;" for we cannot doubt that for the purposes of taxation the word "inhabitant" must be used in the same sense as when used in reference to electing and being elected to office; especially as at that time the payment of a tax duly assessed was one of the qualifications of an elector; and more especially as the Constitution itself professes to give its definition of "inhabitant" for the purpose of removing all doubt as to its meaning. Its language is, "And to remove all doubts concerning the meaning of the word 'inhabitant' in this Constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this State, in that town, district, or plantation, where he dwelleth, or hath his home." Const. Mass. c. 1, § 2, art. 2.

Nor do we see how the construction given to the statute is consistent with the result at which the court arrived. The learned judge

says, "In the statute on which this case depends, we are of opinion that the words 'where he shall be an inhabitant on the first day of May,' mean where he shall have his home on that day." It is therefore clear that the learned judge does not give to the word "inhabitant" the meaning which the construction of the statute before referred to authorizes him to give, but he does give the exact definition of the Constitution, to wit, "where he dwelleth, or hath his home;" for these words have not in the Constitution two meanings, but the single signification given to them by the learned judge, "his home," the exact, strict, technical definition of domicile.

We cannot construe the statute to mean anything else than "being domiciled in." A man need not be a resident anywhere. He must have a domicile. He cannot abandon, surrender, or lose his domicile, until another is acquired. A cosmopolite, or a wanderer up and down the earth, has no residence, though he must have a domicile. It surely was not the purpose of the Legislature to allow a man to abandon his home, go into another State, and then return to this Commonwealth, reside in different towns, board in different houses, public or private, with no intention of making any place a place of residence or home, and thus avoid taxation. Such a construction of the law would create at once a large migratory population.

Although we have said that the case of *Briggs v. Rochester* has been recognized in *Colton v. Longmeadow*, 12 Allen, 598, yet we ought to state that the decision in *Colton v. Longmeadow* was placed upon entirely different grounds. It was there held that the plaintiff had lost his domicile in Massachusetts because he had actually left the Commonwealth, and was actually *in itinere* to his new domicile, which he had left this Commonwealth for the purpose of obtaining, and which in fact he did obtain. If it should be deemed sound to hold that a person, who, before the first of May, with an intention in good faith to leave this State as a residence and to adopt as his home or domicile another place, is in good faith and with reasonable diligence pursuing his way to that place, is not taxable here upon the first of May, the doctrine should be limited strictly to cases falling within these facts. And both of the cases cited, *Briggs v. Rochester* and *Colton v. Longmeadow*, would fall within the rule. In each of those cases, the plaintiff had determined, before starting upon his removal, not only upon his removal, but upon his exact destination, and in fact established himself, according to his purpose, without delay, and within a reasonable time.

We think, however, that the sounder and wiser rule is to make taxation dependent upon domicile. Perhaps the most important reason for this rule is, that it makes the standard certain. Another reason is, that it is according to the general views and traditions of our people.

One cannot but be impressed by certain peculiarities in *Briggs v. Rochester*. The bill of exceptions in that case begins thus: "It

was admitted by both parties and so presented to the jury, that the only question at issue was the domicile of the plaintiff on the first of May, 1858; and that if he was then an inhabitant of the defendant town, the tax was rightly imposed; but that if he was not on that day an inhabitant of said town, he was not then rightly taxable and taxed therein." Nothing can be more clear than that all parties understood, and the case was tried upon the understanding, that domicile and inhabitancy meant the same thing; otherwise, domicile, instead of being "the only question at issue," would not have been in issue at all. And the judge in giving his opinion says that, if domicile in its strictly technical sense, and with its legal incidents, was the controlling fact, the plaintiff was rightly taxed in Rochester.

Another noticeable fact in *Briggs v. Rochester* is this, that if the tax-payer in the pursuit of his purpose is beyond the line of the State before the first of May, he is not liable to taxation in the State; but if by detention he does not cross the line of the State till the first of May, he is taxable here. We cannot adopt a rule which shall make liability to taxation depend upon proximity to a State line.

We have said that we prefer the test of domicile, because of its certainty and because of its conformity to the views and traditions of our people, and, we may add, more in accordance with the various adjudications upon the subject in this State, and more in accord with the general legal and judicial current of thought. It is true, that, as said by Mr. Justice Metcalf, "it has repeatedly been said by this and other courts, that the terms 'domicile,' 'inhabitancy,' and 'residence' have not precisely the same meaning." But it will be found upon examination that these three words are often used as substantially signifying the same thing.

In one of the earliest cases, *Harvard College v. Gore*, 5 Pick. 370, 377, Chief Justice Parker, in defining the word "inhabitant" as used in the laws, defined it as one which imported not only domicile, but something more than domicile. "It imports citizenship and municipal relations, whereas a man may have a domicile in a country to which he is an alien, and where he has no political relations. . . . An inhabitant, by our Constitution and laws, is one who being a citizen dwells or has his home in some particular town, where he has municipal rights and duties, and is subject to particular burdens; and this habitancy may exist or continue notwithstanding an actual residence in another town or another country." There are other passages in the same opinion which, although used *alio intuitu*, yet clearly indicate the current of judicial thought; for example, "The term 'inhabitant' imports many privileges and duties which aliens cannot enjoy or be subject to," p. 373; "does not fix his domicile or habitancy," p. 372; "a pretended change of domicile to avoid his taxes," p. 378. There are other similar expressions running through the whole opinion.

In *Lyman v. Fiske*, 17 Pick. 231, the views of Chief Justice Parker

considered by Chief Justice Shaw; but from the views of Chief Justice apprehension the word "inhabitant" denoted one domiciled, and he did not ascribe to it any other meaning. Neither it imported anything else in relation to rights and liabilities than the word "domicile." The views of that magistrate are never departed from. He gave the opinion in both the cases of *Mr. Justice Metcalf* as settling that "domicile," and "residence" have not proceeded from his opinion to show what his meaning was. "In some respects, perhaps, between habitancy and domicile, as in *Harvard College v. Gore*, 5 Pick. 377, the distinction in citizenship and municipal relations. It is of no importance in the present circumstances which would tend to establish the habitancy. It is not a question of 'habitancy.' In general terms, an inhabitant of that place which constitutes his residence, of his business, pursuits, connections, political and municipal relations. It embraces the fact of residence at a place, and makes it his home. The act of residence may be inferred from declar-

ation, so far as relates to municipal rights. There is substantially no distinction between 'habitancy' and 'domicile.' And, as further illustrating the general sentiment of our people in legislative enactments, we cite his opinion in *Bridgewater*, 28 Pick. 170, 176: "In the Acts of 1692, 1701, and 1707, upon this subject, 'to turn or dwell,' 'being an inhabitant,' 'residence,' 'coming to reside and to dwell,' are all used, and, we think, they are all intended to mean the same thing, namely, to designate domicile. This is defined in the Constitution, to be the place 'where one

dwells almost indefinitely in which it has its domicile.' So far as it relates to municipal rights, the word 'inhabitant' is, with the exception of the word 'domicile,' used as signifying precisely the same thing. See *Thorndike v. Boston*, 1 Met. 242, 245; *Blanchard v. Stearns*, 5 Met. 298, 304, 49; *Bulkeley v. Williamstown*, 8

As illustrative, however, of the fact that domicile and habitancy are, for the ordinary purposes of citizenship, such as voting, liability to taxation and the like, identical, and that when they are susceptible of different meanings they are used *alio intuitu*, we cite the language of Chief Justice Shaw in *Otis v. Boston*, 12 Cush. 44, 49: "Perhaps this question has heretofore been somewhat complicated, by going into the niceties and peculiarities of the law of domicile, taken in all its aspects; and there probably may be cases where the law of domicile, connected with the subject of allegiance, and affecting one's national character, in regard to amity, hostility, and neutrality, is not applicable to this subject. But as a man is properly said to be an inhabitant where he dwelleth and hath his home, and is declared to be so by the Constitution, for the purpose of voting and being voted for; and as one dwelleth and hath his home, as the name imports, where he has his domicile, most of the rules of the law of domicile apply to the question, where one is an inhabitant."

A very strong case of retention of domicile, while *in itinere* to a new one which is subsequently reached, is *Shaw v. Shaw*, 98 Mass. 158, in which the court say that the rule of *Colton v. Longmeadow*, which merely followed *Briggs v. Rochester*, "is such an exception to the ordinary rule of construction as ought not to be extended."

Upon the whole, therefore, we can have no doubt that the word "inhabitant" as used in our statutes when referring to liability to taxation, by an overwhelming preponderance of authority, means "one domiciled." While there must be inherent difficulties in the decisiveness of proofs of domicile, the test itself is a certain one; and inasmuch as every person by universal accord must have a domicile, either of birth or acquired, and can have but one, in the present state of society it would seem that not only would less wrong be done, but less inconvenience would be experienced, by making domicile the test of liability to taxation, than by the attempt to fix some other necessarily more doubtful criterion.

Whether the cases of *Briggs v. Rochester* and *Colton v. Longmeadow* should be followed in cases presenting precisely similar circumstances, the case at bar does not require us to decide; and we reserve further expression of opinion on that question until it shall become necessary for actual adjudication. If they are to be deemed authority, they should certainly be limited to the exact facts, where a person before leaving this Commonwealth has fixed upon a place certain as his future home, and has determined to abandon this Commonwealth for the purpose of settling in his new home, and is, upon the first of May, without the Commonwealth, in good faith and with reasonable despatch actually upon his way to his new home. The plaintiff does not bring himself within this rule; for although he might have left the Commonwealth with the fixed purpose to abandon it as a residence, he did not leave it on his way to a place certain which he had determined upon as his future residence, and was pro

ceeding to with due despatch; and, upon the general rule that, having had a domicile in this Commonwealth, he remains an inhabitant for the purpose of taxation until he has acquired a new domicile, the intention and fact had not concurred at the time when this tax was assessed. The instructions of the presiding judge, therefore, inasmuch as they were not based upon the rules here laid down, were not accurately fitted to the facts of the case, and the

*Exceptions must be sustained.*¹

YOUNG v. POLLAK.

SUPREME COURT OF ALABAMA. 1888.

[Reported 85 Alabama, 439.]

THE plaintiffs were merchants in the city of Montgomery, suing on common counts for goods sold and delivered to Mrs. Effie Young, the defendant, who was a married woman. The defendant pleaded the general issue, and a special plea averring her coverture; the plaintiffs replied, alleging that her husband had abandoned her, and had removed from the State, and thereafter the defendant carried on business on her own account and in her own name, as if sole and unmarried.²

STONE, C. J. The fourth charge given at the request of plaintiffs in each of these cases is in the following language: "If W. L. Young, husband of defendant, removed into the State of Alabama as a place of refuge, or to escape arrest in the State of Georgia, and that was his sole purpose, this would not give him a domicile in Alabama." Change of domicile consists of an act done, with an intent. The act is an actual change of residence. The intent, to effect the change, must be to acquire a new domicile, either permanent in purpose, or of indefinite duration. A temporary habitation, without intent to make it a permanent home, or one of indefinite duration, is not a change of domicile. *Merrill v. Morrisset*, 76 Ala. 433; 5 Amer. & Eng. Encyc. of Law, 863.

The charge copied hinges the question of Young's change of domicile on the purpose with which he moved from Georgia to Alabama. Men change their domiciles with very varying purposes or motives. The desire to live in a healthier region, to have better social or educational advantages, to enjoy better church privileges, to be near one's relatives, to live in a new and growing country, and sometimes to be

¹ *Acc. Pfoutz v. Comfort*, 36 Pa. 420. No change of domicile takes place while one is *in itinere* to a new domicile: *Lamar v. Mahony*, Dudley, 92; *Littlefield v. Brooks*, 50 Me. 475; *Bulkley v. Williamstown*, 3 Gray, 493; *Shaw v. Shaw*, 98 Mass. 158. — Ed.

² This statement, containing all the facts necessary to understand the question of domicile raised, is substituted for the statement of the reporter. Part of the opinion is omitted. — Ed.

relieved of disagreeable surroundings, — these and many more may be classed among the purposes — sole purposes, if you please — with which men change their residence. Yet, if the change be in fact made with the intent to acquire a new residence, either permanent or of indefinite duration, this is a change of domicile. The intent that the new habitation shall, or shall not be, permanent, or of indefinite duration, and not the purpose in making the change, is the pivot on which the inquiry turns. The city court erred in giving this charge.

The second charge at the instance of plaintiffs in each of these cases needs modification. If Young, under the rules declared above, became a resident of Alabama, then his return to Georgia under arrest, or involuntary confinement there, are, of themselves, no evidence of a change of domicile.¹

DITSON v. DITSON.

SUPREME COURT OF RHODE ISLAND. 1856.

[*Reported 4 Rhode Island, 87.*]

AMES, C. J.² Although, as a general doctrine, the domicile of the husband is, by law, that of the wife, yet, when he commits an offence, or is guilty of such dereliction of duty in the relation as entitles her to have it either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicile of her own. This she may establish, nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish, in a different judicial or State jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicile of her own; and especially if a native of the State to which she flies for refuge, is, upon familiar principles, readily reintegrated in her old domicile. This is the well-settled doctrine of law upon the subject (Bishop on Marriage and Divorce, §§ 728–730 incl. and cases cited), and has by no court been more ably vindicated than by the Supreme Court of Massachusetts. *Harteau v. Harteau*, 14 Pick. 181, 186.

A more proper case for the application in favor of a petitioner for divorce of the foregoing principles relating to the jurisdiction of the

¹ One confined in prison does not become domiciled in the prison. *Grant v. Dalliber*, 11 Conn. 234; *Barton v. Barton*, 74 Ga. 761. So one forcibly removed from his home by military authorities does not lose his domicile. *Hardy v. De Leon*, 5 Tex. 211.

Paupers in a poorhouse do not acquire a domicile there. *Clark v. Robinson*, 88 Ill. 498. *Contra*, *Sturgeon v. Korte*, 34 Ohio St. 525.

Political refugees do not ordinarily relinquish their domicile. *De Bonneval v. De Bonneval*, 1 Curt. Eccl. 856; *Ennis v. Smith*, 14 How. 400 (*seemingly*); but see *S. v. De Casinova*, 1 Tex. 401. — ED.

² Part of the opinion only, involving the question of domicile, is given. — ED.

court over her case, and to the question of her domicile in this State, can hardly be imagined, than the case at bar. The petitioner is the daughter of a native of this State, who, though formerly resident in Boston, has for many years past been domiciled in his native place, Little Compton. Whilst at school, the petitioner became acquainted with an Englishman of the name of Ditson, and, in 1842, married him, without the knowledge or consent of her parents, in New York. Immediately after marriage the couple went to Europe, and from thence to Cuba, where they lived together several years. Upon their return to this country, she being in a feeble and emaciated condition, he deserted her for the first time in Boston, and was absent in Europe, without leaving any provision for her, for about two years. Upon his return, they appear to have lived together again; he, however, giving every indication of a morose as well as inattentive husband. After a short time, he deserted her again in Boston, declaring, upon his leaving it for Europe, that he cared nothing about it, or any person in it, pointing, as the testimony is put to us, to his unfortunate wife. He has been absent from her now between three and four years, without communicating with her, or providing, though of sufficient ability, anything for her support, nor does she know where he is, except that he has gone to Europe. In the mean time, deserted as she was, she was obliged to return to her father's house in Little Compton; where, during this time, supported by him or by her own exertions, she has resided, with the exception of about three months passed by her in Newport, Rhode Island. For this desertion and neglect to provide for her, the proof, *ex parte* it is true, but coming from respectable sources, finds no excuse in her conduct, which, according to it, has always, so far as known, been that of a dutiful and faithful wife. . . . Whatever was the former domicile of the petitioner, we are satisfied that she is, and has, for upwards of the last three years, been a domiciled citizen of Rhode Island, — her only home, in the house of her father.¹

¹ "The law will recognize a wife, as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home, bed and board being put, a part for the whole, as expressive of the idea of *home*. Otherwise, the parties in this respect would stand upon very unequal grounds, it being in the power of the husband to change his domicile at will, but not in that of the wife. The husband might deprive the wife of the means of enforcing her rights, and in effect of the rights themselves, and of the protection of the laws of the Commonwealth, at the same time that his own misconduct gives her a right to be rescued from his power on account of his own misconduct towards her." SHAW, C. J., in *Harteau v. Harteau*, 14 Pick. 181. "She may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues." SWAYNE, J., in *Cheever v. Wilson*, 9 Wall. 108. *Acc.* *Hanbury v. Hanbury*, 20 Ala. 629; *Chapman v. Chapman*, 129 Ill. 386; *Hunt v. Hunt*, 72 N. Y. 217. *Contra*, *Yelverton v. Yelverton*, 1 Sw. & Tr. 574; *Maguire v. Maguire*, 7 Dana, 181; and see *Hinds v. Hinds*, 1 Ia. 36. In some jurisdictions it is held that if a wife is living apart from her husband for cause, she *must*, for purposes of divorce, have a

LAMAR v. MICOU.

SUPREME COURT OF THE UNITED STATES. 1884.

[Reported 112 United States, 452.]

THIS is an appeal by the executor of a guardian (Lamar) from a decree of the Circuit Court of the United States for the Southern District of New York, in favor of the plaintiff, the administratrix of his ward. The bill prayed for an account of the ward's estate. The guardian alleged that the property had been lost through unfortunate investments; and the question was whether the law which governed the duties of the guardian permitted such investments.¹

GRAY, J. An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicile, change the domicile of the infants; the domicile of the children, in either case, following the independent domicile of their parent. *Kennedy v. Ryall*, 67 N. Y. 379; *Pottinger v. Wightman*, 3 Meriv. 67; *Dedham v. Natick*, 16 Mass. 135; *Dacey on Domicile*, 97-99. But when the widow, by marrying again, acquires the domicile of a second husband, she does not, by taking her children by the first husband to live with her there, make the domicile which she derives from her second husband their domicile; and they retain the domicile which they had, before her second marriage, acquired from her or from their father. *Cumner v. Milton*, 3 Salk. 259; s. c. *Holt*, 578; *Freetown v. Taunton*, 16 Mass. 52; *School Directors v. James*, 2 Watts & Sergeant, 568; *Johnson v. Copeland*, 35 Alabama, 521; *Brown v. Lynch*, 2 Bradford, 214; *Mears v. Sinclair*, 1 West Virginia, 185; *Pothier's Introduction Générale aux Coutumes*, No. 19; 1 *Burge Colonial and Foreign Law*, 39; 4 *Phillimore International Law* (2d ed.) § 97.

The preference due to the law of the ward's domicile, and the importance of a uniform administration of his whole estate, require that, as a general rule, the management and investment of his property

separate domicile, and cannot claim that of her husband. *White v. White*, 18 R. L. 292, 27 Atl. 506; *Dutcher v. Dutcher*, 39 Wis. 651.

For all purposes except that of bringing suit for divorce, the wife's domicile is that of her husband, even if she is living apart from him. *Warrender v. Warrender*, 9 Bligh, 103; *Dolphin v. Robbins*, 7 H. L. C. 390; *Christie's Succession*, 20 La. Ann. 383; *Greene v. Windham*, 13 Me. 225; *Greene v. Greene*, 11 Pick. 410; *Hackettstown Bank v. Mitchell*, 28 N. J. L. 516. *Contra*, *Shute v. Sargent*, 67 N. H. 305, *infra*, p. 211. If divorced from bed and board, however, the wife may and must have a separate domicile. *Williams v. Dormer*, 16 Jur. 366; *Barbour v. Barbour*, 21 How. 582. — ED.

¹ This short statement of facts, presenting such facts as (in addition to those stated in the extract printed) are necessary for understanding so much of the case as is printed, is substituted for the statement by Mr. Justice Gray. Part of the opinion is omitted. — ED.

should be governed by the law of the State of his domicile, especially when he actually resides there, rather than by the law of any State in which a guardian may have been appointed or may have received some property of the ward. If the duties of the guardian were to be exclusively regulated by the law of the State of his appointment, it would follow that in any case in which the temporary residence of the ward was changed from State to State, from considerations of health, education, pleasure, or convenience, and guardians were appointed in each State, the guardians appointed in the different States, even if the same persons, might be held to diverse rules of accounting for different parts of the ward's property. The form of accounting, so far as concerns the remedy only, must indeed be according to the law of the court in which relief is sought; but the general rule by which the guardian is to be held responsible for the investment of the ward's property is the law of the place of the domicile of the ward. Bar, International Law, § 106 (Gillespie's translation), 438; Wharton, Conflict of Laws, § 259.

It may be suggested that this would enable the guardian, by changing the domicile of his ward, to choose for himself the law by which he should account. Not so. The father, and after his death the widowed mother, being the natural guardian, and the person from whom the ward derives his domicile, may change that domicile. But the ward does not derive a domicile from any other than a natural guardian. A testamentary guardian nominated by the father may have the same control of the ward's domicile that the father had. *Wood v. Wood*, 5 Paige, 596, 605. And any guardian, appointed in the State of the domicile of the ward, has been generally held to have the power of changing the ward's domicile from one county to another within the same State and under the same law. *Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. 20; *Kirkland v. Whately*, 4 Allen, 462; *Anderson v. Anderson*, 42 Vermont, 350; *Ex parte Bartlett*, 4 Bradford, 221; *The Queen v. Whitby*, L. R. 5 Q. B. 325, 331. But it is very doubtful, to say the least, whether even a guardian appointed in the State of the domicile of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicile beyond the limits of the State in which the guardian is appointed and to which his legal authority is confined. *Douglas v. Douglas*, L. R. 12 Eq. 617, 625; *Daniel v. Hill*, 52 Alabama, 430; Story, Conflict of Laws, § 506, note; Dicey on Domicile, 100, 132. And it is quite clear that a guardian appointed in a State in which the ward is temporarily residing cannot change the ward's permanent domicile from one State to another.

The case of such a guardian differs from that of an executor of, or a trustee under, a will. In the one case, the title in the property is in the executor or the trustee; in the other, the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment. The executor or trustee is appointed at the domicile of the testator; the guardian is most fitly

appointed at the domicile of the ward, and may be appointed in any State in which the person or any property of the ward is found. The general rule which governs the administration of the property in the one case may be the law of the domicile of the testator; in the other case, it is the law of the domicile of the ward.

As the law of the domicile of the ward has no extraterritorial effect, except by the comity of the State where the property is situated, or where the guardian is appointed, it cannot of course prevail against a statute of the State in which the question is presented for adjudication, expressly applicable to the estate of a ward domiciled elsewhere. *Hoyt v. Sprague*, 103 U. S. 618. Cases may also arise with facts so peculiar or so complicated as to modify the degree of influence that the court in which the guardian is called to account may allow to the law of the domicile of the ward, consistently with doing justice to the parties before it. And a guardian, who had in good faith conformed to the law of the State in which he was appointed, might perhaps be excused for not having complied with stricter rules prevailing at the domicile of the ward. But in a case in which the domicile of the ward has always been in a State whose law leaves much to the discretion of the guardian in the matter of investments, and he has faithfully and prudently exercised that discretion with a view to the pecuniary interests of the ward, it would be inconsistent with the principles of equity to charge him with the amount of the moneys invested, merely because he has not complied with the more rigid rules adopted by the courts of the State in which he was appointed.

The domicile of William W. Sims during his life and at the time of his death in 1850 was in Georgia. This domicile continued to be the domicile of his widow and of their infant children until they acquired new ones. In 1853, the widow, by marrying the Rev. Mr. Abercrombie, acquired his domicile. But she did not, by taking the infants to the home, at first in New York and afterwards in Connecticut, of her new husband, who was of no kin to the children, was under no legal obligation to support them, and was in fact paid for their board out of their property, make his domicile, or the domicile derived by her from him, the domicile of the children of the first husband. Immediately upon her death in Connecticut, in 1859, these children, both under ten years of age, were taken back to Georgia to the house of their father's mother and unmarried sister, their own nearest surviving relatives; and they continued to live with their grandmother and aunt in Georgia until the marriage of the aunt in January, 1860, to Mr. Micou, a citizen of Alabama, after which the grandmother and the children resided with Mr. and Mrs. Micou at their domicile in that State.

Upon these facts, the domicile of the children was always in Georgia from their birth until January, 1860, and thenceforth was either in Georgia or in Alabama. As the rules of investment prevailing before 1863 in Georgia and in Alabama did not substantially differ, the question in which of those two States their domicile was is immaterial to

the decision of this case; and it is therefore unnecessary to consider whether their grandmother was their natural guardian, and as such had the power to change their domicile from one State to another. See Hargrave's note 66 to Co. Lit. 88 *b*; Reeve, Domestic Relations, 315; 2 Kent, Com. 219; Code of Georgia of 1861, §§ 1754, 2452; Darden v. Wyatt, 15 Georgia, 414.

Whether the domicile of Lamar in December, 1855, when he was appointed in New York guardian of the infants, was in New York or in Georgia, does not distinctly appear, and is not material; because, for the reasons already stated, wherever his domicile was, his duties as guardian in the management and investment of the property of his wards were to be regulated by the law of their domicile.

On petition for re-hearing, GRAY, J., said (114 U. S. 218): If the domicile of the father was in Florida at the time of his death in 1850, then, according to the principles stated in the former opinion, the domicile of his children continued to be in that State until the death of their mother in Connecticut in 1859. In that view of the case, the question would be whether they afterwards acquired a domicile in Georgia by taking up their residence there with their paternal grandmother. Although some books speak only of the father, or, in the case of his death, the mother, as guardian by nature (1 Bl. Com. 461; 2 Kent, Com. 219), it is clear that the grandfather or grandmother, when the next of kin, is such a guardian. Hargrave, note 66, to Co. Lit. 88 *b*; Reeve, Dom. Rel. 315. See also, Darden v. Wyatt, 15 Ga. 414. In the present case, the infants, when their mother died and they went to the home of their paternal grandmother, were under ten years of age; the grandmother, who appears to have been their only surviving grandparent and their next of kin, and whose only living child, an unmarried daughter, resided with her, was the head of the family; and upon the facts agreed it is evident that the removal of the infants after the death of both parents to the home of their grandmother in Georgia was with Lamar's consent. Under these circumstances, there can be no doubt that by taking up their residence with her, they acquired her domicile in that State in 1859, if their domicile was not already there.¹

¹ The domicile of an infant follows that of his father: Metcalf v. Lowther, 56 Ala. 312; Kennedy v. Ryall, 67 N. Y. 379; and so long as the infant is not emancipated he can obtain no other domicile, though living away from his father's home: Wheeler v. Burrow, 18 Ind. 14; even if he has run away from home: Bangor v. Readfield, 32 Me. 60; or has been bound out to service by the public authorities: Oldtown v. Falmouth, 40 Me. 106.

Upon the death of the father, the mother's domicile ordinarily becomes that of the minor, and if she being *sui juris* changes her domicile that of the child follows; subject perhaps to the condition that the change be made *bona fide*, and not for the purpose of securing an advantage at the expense of the child or the child's estate. Pottinger v. Wightman, 3 Mer. 67; Brown v. Lynch, 2 Bradf. 214; School Directors v. James, 2 W. & S. 568. A posthumous child, therefore, takes the domicile of the mother at its birth: Watson v. Bondurant, 30 La. Ann. 1303 (*semble*). If, however, the mother marries again, since she is no longer *sui juris*, she cannot affect the domicile of the minor: School Directors v. James, 2 W. & S. 568; Allen v. Thomason, 11 Humph.

SHUTE v. SARGENT.

SUPREME COURT OF NEW HAMPSHIRE. 1892.

[Reported 67 New Hampshire, 305.]

BLODGETT, J.¹ The maxim that the domicile of the wife follows that of her husband "results from the general principle that a person who is under the power and authority of another possesses no right to choose a domicile." Story, Conf. Laws, s. 46. "By marriage, husband and wife become one person in law, — that is, the very being or legal existence of the wife is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything." 1 Bl. Com. 442. Such being the common-law status of the wife, her domicile necessarily fol-

536 (*contra*, Succession of Lewis, 10 La. Ann. 789; and see Wheeler v. Hollis, 19 Tex. 522); and therefore if the mother remarries before the birth of the posthumous child, the child takes the domicile of its mother before the second marriage: Oxford v. Bethany, 19 Conn. 229.

An infant does not get the domicile of an appointed guardian *ex officio* if the infant actually lives elsewhere. Louisville v. Sherley, 80 Ky. 71; School Directors v. James, 2 W. & S. 568; Petigru v. Ferguson, 6 Rich. Eq. 378. The guardian may, however, change the infant's domicile by changing the actual home of the infant within the State. Kirkland v. Whately, 4 All. 462; *contra*, Marheineke v. Grothaus, 72 Mo. 204. He cannot, however, change the ward's domicile outside the State, since his authority over the ward's person ceases at the State line. Douglas v. Douglas, L. R. 12 Eq. 617, 625; Robins v. Weeks, 5 Mart. N. s. 379; Trammell v. Trammell, 20 Tex. 406; but see Wood v. Wood, 5 Paige, 596, 605; Wheeler v. Hollis, 19 Tex. 522. *A fortiori* such a change cannot be made without the guardian's consent. Hiestand v. Kuns, 8 Blackf. 345; Munday v. Baldwin, 79 Ky. 121.

An emancipated minor may acquire a new domicile by his own will: Lubec v. Eastport, 3 Me. 220; and such minor no longer shares a new domicile acquired by the father: Lowell v. Newport, 66 Me. 78; or by the mother, after the father's death: Dennyville v. Trescott, 80 Me. 470; Charlestown v. Boston, 13 Mass. 469. After emancipation the father cannot change the child's domicile. *In re Vance*, 92 Cal. 195, 28 Pac. 229.

In Georgia, where a guardian has no right to restrain the person of a ward twenty years old, such a ward may acquire a domicile by his own choice. Roberts v. Walker, 18 Ga. 5.

An apprentice takes the domicile of his master. Maddox v. S., 32 Ind. 111.

An insane person, though under guardianship, may yet change his domicile if he in fact retains sufficient power of will. Culver's Appeal, 48 Conn. 165; Concord v. Rumney, 45 N. H. 423; Mowry v. Latham, 17 R. I. 480, 28 Atl. 13. A person *non compos* from birth, continuing to live in his father's family after reaching his majority, follows his father's domicile. Sharpe v. Crispin, L. R. 1 P. & D. 611; Monroe v. Jackson, 55 Me. 55; Upton v. Northbridge, 15 Mass. 237. If such a person has an appointed guardian, the latter may change the domicile of the ward into his own family by making him an inmate of it: Holyoke v. Haskins, 5 Pick. 20; Jackson v. Polk, 19 Ohio S. 28; or even, it has been held, to a new independent home: Anderson v. Anderson, 42 Vt. 350. It has been held that if one *non compos* becomes emancipated by the death of his parents and the failure of appointment of a guardian, he may gain a residence where he actually lives. Gardiner v. Farmington, 45 Me. 537. — Ed.

¹ The opinion only is given: it sufficiently states the case. — Ed.

lowed her husband's, and the maxim applied without limitation or qualification.

But the common-law theory of marriage has largely ceased to obtain everywhere, and especially in this State, where the law has long recognized the wife as having a separate existence, separate rights, and separate interests. In respect to the duties and obligations which arise from the contract of marriage and constitute its object, husband and wife are still, and must continue to be, a legal unit; but so completely has the ancient unity become dissevered, and the theory of the wife's servitude superseded by the theory of equality which has been established by the legislation and adjudications of the last half century, that she now stands, almost without an exception, upon an equality with the husband as to property, torts, contracts, and civil rights. Pub. Sts., c. 176; *ib.*, c. 90, s. 9; *Seaver v. Adams*, 66 N. H. 142, 143, and authorities cited. And since the law puts her upon an equality, so that he now has no more power and authority over her than she has over him, no reason would seem to remain why she may not acquire a separate domicile for every purpose known to the law. If, however, there are exceptional cases when for certain purposes it might properly be held otherwise, there can be in this jurisdiction no reason for holding that when the husband has forfeited his marital rights by his misbehavior, the wife may not acquire a separate domicile, and exercise the appertaining rights and duties of citizenship with which married women have become invested. To hold otherwise would not only break the line of consistency and progress which has been steadily advanced until the ancient legal distinctions between the sexes, which were adapted to a condition that has ceased to exist and can never return, have been largely swept away, but it would also be subversive of the statutory right of voting and being elected to office in educational matters which wives now possess (Pub. Sts., c. 90, ss. 9, 14), inasmuch as it would compel the innocent wife to reside and make her home in whatever voting precinct the offending husband might choose to fix his domicile, or to suffer the deprivation of the elective franchise; and if he should remove his domicile to another State, and she should remain here, the exercise of all her rights dependent upon domicile would be similarly affected.

This cannot be the law. On the contrary, the good sense of the thing is, that a wife cannot be divested of the right of suffrage, or be deprived of any civil or legal right, by the act of her husband; and so we take the law to be. Whenever it is necessary or proper for her to acquire a separate domicile, she may do so. This is the rule for the purposes of divorce (*Payson v. Payson*, 84 N. H. 518; *Cheever v. Wilson*, 9 Wall. 108, 124; *Ditson v. Ditson*, 4 R. I. 87, 107; *Harding v. Alden*, 9 Greenl. 140), and it is the true rule for all purposes.

Upon these views, the testatrix was domiciled in this State at the time of her decease, and, as the consequence, distribution of her estate is to be made accordingly. *Goodall v. Marshall*, 11 N. H. 88; *Vande-*

walker v. Rollins, 63 N. H. 460, 463, 464. The rights of her husband therein are not affected by his written assent to the will. The Massachusetts statute, making such assent binding, has no extraterritorial force, and there is no principle upon which it can be given effect in this jurisdiction without violating the positive enactments of our statute relative to the husband's distributive share in his deceased wife's estate. Pub. Sts., c. 195, ss. 12, 13. This cannot be done. If the result shall be to give to this husband a benefit which the testatrix did not intend he should receive, and which in justice he ought not to have, it is to be regretted; but hard cases cannot be permitted to make bad equity any more than bad law.

*Case discharged.*¹

BERGNER & ENGEL BREWING CO. v. DREYFUS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1898.

[Reported 172 Massachusetts, 154.]

HOLMES, J.² This is a suit by a Pennsylvania corporation to recover a debt for goods sold and delivered here. The only defence is a discharge in insolvency under our statutes, which of course commonly is no defence at all. This was reaffirmed unanimously in 1890, after full consideration of the objections now urged; and it was decided also, not for the first time, that the general language of the insolvent law was not intended to affect access to Massachusetts courts by a local rule of procedure unless the substantive right was barred by the discharge. *Phoenix National Bank v. Batcheller*, 151 Mass. 589. The grounds urged for an exception in the present case are: that the plaintiff, although its brewery and main offices are in Pennsylvania, has an office in Boston, and maintains here a complete outfit for the distribution of its products; that it has a license of the fourth class under Pub. Sts. c. 100, § 10; and that it has complied with the laws regulating foreign corporations doing business here, including, we assume, that which requires the appointment of the commissioner of corporations its "attorney upon whom all lawful processes in any action or proceeding against it may be served." St. 1884, c. 330, § 1. See St. 1895, c. 157. . . . The independent ground on which it is urged that the plaintiff is subject to the insolvent law in the present case is that the plaintiff is domesticated in this State, as shown by the facts above recited, of which the appointment of an attorney is only one. The word "domesticated," which was used in the argument for the defendant, presents no definite legal conception which has any bearing upon the case. We presume that it was intended to convey in a conciliatory form the notion that the plaintiff was domiciled here, — "resident," in

¹ *Acc. In re Florance*, 54 Hun, 328. — Ed.

² The statement of facts and part of the opinion are omitted. — Ed.

the language of Pub. Sts. c. 157, § 81, — and therefore barred by the language and legal operation of the act. It could not be contended that the corporation was a citizen of Massachusetts. In such sense as it is a citizen of any State, it is a citizen of the State which creates it and of no other. But there are even greater objections to a double domicile than there are to double citizenship. Under the law as it has been, a man might find himself owing a double allegiance without any choice of his own. But domicile, at least for any given purpose, is single by its essence. Dicey, *Conf. of Laws*, 95. A corporation does not differ from a natural person in this respect. If any person, natural or artificial, as a result of choice or on technical grounds of birth or creation, has a domicile in one place, it cannot have one elsewhere, because what the law means by domicile is the one technically pre-eminent headquarters, which, as a result either of fact or of fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined. It is settled that a corporation has its domicile in the jurisdiction of the State which created it, and as a consequence that it has not a domicile anywhere else. *Boston Investment Co. v. Boston*, 158 Mass. 461, 462, 463; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 450; *Martine v. International Ins. Co.*, 53 N. Y. 339, 346. The so-called modifications of this rule by statutes like the act of 1884 do not modify it, because jurisdiction of the ordinary personal actions does not depend upon domicile, but only upon such presence within the jurisdiction as to make service possible. See *In re Hohorst*, 150 U. S. 653. But the operation of our insolvent law by its very terms may, and in this case does, depend upon the domicile of the creditor, and as there can be no doubt either in fact or in law that the plaintiff was domiciled in Pennsylvania in such a sense that a statute like Pub. Sts. c. 157, § 1, would hit it there, it cannot have been domiciled here for the same purpose at the same time.

*Judgment for the plaintiff affirmed.*¹

FIELD, C. J., dissenting.

¹ *Acc. Germania F. I. Co. v. Francis*, 11 Wall. 210; *Cook v. Hager*, 3 Col. 386; *Chafee v. Fourth Nat. Bank*, 71 Me. 514; *B. & O. R. R. v. Glenn*, 28 Md. 287.

Dicta in the English cases are, however, *contra*. *Newby v. Van Oppen*, L. R. 7 Q. B. 293; *Russell v. Cambefort*, 23 Q. B. D. 526. "I think that this company may properly be deemed both Scotch and English. It may, for purposes of jurisdiction, be deemed to have two domiciles. Its business is necessarily carried on by agents, and I do not know why its domicile should be considered to be confined to the place where the goods are manufactured. The business transacted in England is very extensive. The places of business may, for the purposes of jurisdiction, properly be deemed the domicile." — Lord St. Leonards in *Carron Iron Co. v. Maclaren*, 5 H. L. O. 416, 449. — Ed.

In *Martine v. International L. Ins. Soc.*, 53 N. Y. 339, an English company with a permanent general agency in New York was held, as to business done through such agency, to have, in time of war, a commercial (though not an ordinary civil) domicile in New York.

SECTION II.

TAXATION.

HAYS v. PACIFIC MAIL STEAMSHIP CO.

SUPREME COURT OF THE UNITED STATES. 1855.

[Reported 17 Howard, 596.]

NELSON, J. This is a writ of error to the District Court for the Northern District of California.

The suit was brought in the District Court by the company, to recover back a sum of money which they were compelled to pay to the defendant, as taxes assessed in the State of California, upon twelve steamships belonging to them, which were temporarily within the jurisdiction of the State.

The complaint sets forth that the plaintiffs are an incorporated company by the laws of New York; that all the stockholders are residents and citizens of that State; that the principal office for transacting the business of the company is located in the city of New York, but, for the better transaction of their business, they have agencies in the city of Panama, New Grenada, and in the city of San Francisco, California; that they have, also, a naval dock and shipyard at the port of Benicia, of that State, for furnishing and repairing their steamers; that, on the arrival at the port of San Francisco, they remain no longer than is necessary to land their passengers, mails, and freight, usually done in a day; they then proceed to Benicia, and remain for repairs and refitting until the commencement of the next voyage, usually some ten or twelve days; that the business in which they are engaged is in the transportation of passengers, merchandise, treasure, and the United States mails, between the city of New York and the city of San Francisco, by way of Panama, and between San Francisco and different ports in the Territory of Oregon; that the company are sole owners of the several vessels, and no portion of the interest is owned by citizens of the State of California; that the vessels are all ocean steamships, employed exclusively in navigating the waters of the ocean; that all of them are duly registered at the custom-house in New York, where the owners reside; that taxes have been assessed upon all the capital of the plaintiffs represented by the steamers in the State of New York, under the laws of that State, ever since they have been employed in the navigation, down to the present time; that the said steamships have been assessed in the State of California and county of San Francisco, for the year beginning 1st July, 1851, and ending 30th June, 1852, claiming the assessment as annually due, under an act of

the legislature of the State; that the taxes assessed amount to \$11,962.50, and were paid under protest, after one of the vessels was advertised for sale by the defendant, in order to prevent a sale of it.

To this complaint the defendant demurred, and the court below gave judgment for the plaintiffs.

By the 3d section of the Act of Congress of 31st December, 1792, it is provided that every ship or vessel, except as thereafter provided, shall be registered by the collector of the district, in which shall be comprehended the port to which the ship or vessel shall belong at the time of her registry, and which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, nearest to the place where the husband, or acting and managing owner, usually resides; and the name of the ship, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length; and if any ship or vessel of the United States shall be found without having her name, and the name of the port to which she belongs, painted in the manner mentioned, the owner or owners shall forfeit fifty dollars.

And by the Act of 29th July, 1850 (9 Stats. at Large, 440), it is provided that no bill of sale, mortgage, or conveyance of any vessel shall be valid against any person other than the grantor, etc., and persons having actual notice, unless such bill of sale, mortgage, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled.

These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside. In this case, therefore, the home port of the vessels of the plaintiffs was the port of New York, where they were duly registered, and where all the individual owners are resident, and where is also the principal place of business of the company; and where, it is admitted, the capital invested is subject to State, county, and other local taxes.

These ships are engaged in the transportation of passengers, merchandise, etc., between the city of New York and San Francisco, by the way of Panama, and between San Francisco and different ports in the territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the States.

Now, it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax. It may be that the course of trade or other circumstances might not occasion as great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, etc., which in no respect can affect the question as to the *situs* of the property, in view of the right of taxation by the State.

Besides, whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port. Our merchant vessels are not unfrequently absent for years, in the foreign carrying trade, seeking cargo, carrying and unloading it from port to port, during all the time absent; but they neither lose their national character nor their home port, as inscribed upon their stern.

The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State, is familiar in the admiralty law, and she is subjected, in many cases, to the application of a different set of principles. 7 Pet. 324; 4 Wheat. 438.

We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid.

An objection is taken to the recovery against the collector, on the ground, mainly, that the assessment under the law of California, by the assessors, was a judicial act, and that the party should have pursued his remedy to set it aside according to the provisions of that law.

We do not think so. The assessment was not a judicial, but a ministerial act, and as the assessors exceeded their powers in making it, the officer is not protected.

The payment of the tax was not voluntary, but compulsory, to prevent the sale of one of the ships.

Our conclusion is, that the judgment of the court below is right, and should be affirmed.

29 Jud. 111

STATE TAX ON FOREIGN-HELD BONDS.

SUPREME COURT OF THE UNITED STATES. 1878.

[*Reported 15 Wallace, 300.*]

FIELD, J. The question presented in this case for our determination is whether the eleventh section of the Act of Pennsylvania of May, 1868, so far as it applies to the interest on bonds of the railroad company, made and payable out of the State, issued to and held by non-residents of the State, citizens of other States, is a valid and constitutional exercise of the taxing power of the State, or whether it is an interference, under the name of a tax, with the obligation of the contracts between the non-resident bondholders and the corporation. If it be the former, this court cannot arrest the judgment of the State court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

The case before us is similar in its essential particulars to that of *The Railroad Company v. Jackson*, reported in 7 Wallace. There, as here, the company was incorporated by the legislatures of two States, Pennsylvania and Maryland, under the same name, and its road extended in a continuous line from Baltimore in one State to Sunbury in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their security upon its entire road, its franchises and fixtures, including the portion lying in both States. Coupons for the different instalments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either State. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the Circuit Court of the United States for the District of Maryland. That court, the chief justice presiding, instructed the jury that if the

plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax under the law of Pennsylvania could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the acts of her legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned justice, who delivered the opinion of the court, reached this conclusion, may be open, perhaps, to some criticism. It is not perceived how the fact that the mortgage given for the security of the bonds in that case covered that portion of the road which extended into Maryland could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another State, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that State. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors, in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse

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terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.

The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The Act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent upon every dollar, and pay it into the treasury of the Commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

The case of *Maltby v. The Reading and Columbia Railroad Company*, decided by the Supreme Court of Pennsylvania in 1866, was referred to by the Common Pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that State. But it is evident from a perusal of the opinion of the court that the decision proceeded upon the idea that the bond of the non-resident was itself property in the State because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the Legislature of

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Pennsylvania cannot impose a personal tax upon the citizen of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state that the principle of taxation as the correlative of protection is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the Commonwealth, and as an investment rests upon State authority, and, therefore, ought to contribute to the support of the State government. It also adds that, though the loan is for some purposes subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the company could not enforce it except in that State, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the State which creates and protects a corporation ought to have the right to tax the loans negotiated by it, though taken and held by non-residents, a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in whatever manner made payable it would ultimately fall on the company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations. But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the State, or that the non-resident had any property in the State which was subject to taxation within the principles laid down by the court itself, which we have cited.

The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been fre-

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quently ruled by her highest court. In *Witmer's Appeal*, 45 Penn. S. 463, the court said: "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it, and no more than liens." And in that State all possible interests in lands, whether vested or contingent, are subject to levy and sale on execution, yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises cannot be taken in execution for his debt. In *Rickert v. Madeira*, 1 Rawle, 329, the court said: "A mortgage must be considered either as a chose in action or as giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out and subject it to a dower and to the lien of a judgment; and that it is but a chose in action, a mere evidence of debt, is apparent from the whole current of decisions." *Wilson v. Shoenberger's Executors*, 31 Penn. S. 295.

Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that State owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner.

It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

Cases were cited by counsel on the argument from the decisions of the highest courts of several States, which accord with the views we have expressed. In *Davenport v. The Mississippi and Missouri Railroad Company*, 12 Iowa, 539, the question arose before the Supreme Court of Iowa whether mortgages on property in that State held by non-residents could be taxed under a law which provided that all prop-

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erty, real and personal, within the State, with certain exceptions not material to the present case, should be subject to taxation, and the court said:—

“Both in law and equity the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the State, but, the mortgage itself being personal property, a chose in action attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the State. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the State, and if not they are not the subject of taxation.”

In *People v. Eastman*, 25 Cal. 603, the question arose before the Supreme Court of California whether a judgment of record in Mariposa County upon the foreclosure of a mortgage upon property situated in that county could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the county where situated; and it was held that it was not taxable there. “The mortgage,” said the court, “has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the State; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another although the debt secured is the same.”

Some adjudications in the Supreme Court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in *Maltby v. Reading and Columbia Railroad Company*, particularly the case of *McKeen v. The County of Northampton*, 49 Penn. S. 519, and the case of *Short's Estate*, 16 Id. 63, but we do not deem it necessary to pursue the matter further. We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State, the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extraterritorial operation; nor can any law of that State, inconsistent with the terms of a con-

tract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extraterritorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this court. *Ogden v. Saunders*, 12 Wheaton, 214; *Baldwin v. Hale*, 1 Wallace, 223. A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State.

*Judgment reversed, and the cause remanded for further proceedings, in conformity with this opinion.*¹

DAVIS, CLIFFORD, MILLER, and HUNT, JJ., dissenting.

PULLMAN'S PALACE-CAR CO. v. PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 141 *United States*, 18.]

GRAY, J.² Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania, is a question on which the decision of the highest court of the State is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. *Green v. Van Buskirk*, 5

¹ See *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490; *Detroit v. Board of Assessors*, 91 Mich. 78. — Ed.

² Part of the opinion of the court and part of the dissenting opinion are omitted. — Ed.

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Wall. 307, and 7 Wall. 139; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Harkness v. Russell*, 118 U. S. 663, 679; *Walworth v. Harris*, 129 U. S. 355; Story on Conflict of Laws, § 550; Wharton on Conflict of Laws, §§ 297-311. As observed by Mr. Justice Story, in his commentaries just cited, "Although movables are for many purposes to be deemed to have no *situs*, except that of the domicile of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax. *Lane County v. Oregon*, 7 Wall. 71, 77; *Railroad Co. v. Pennsylvania*, 15 Wall. 300, 323, 324, 328; *Railroad Co. v. Peniston*, 18 Wall. 5, 29; *Tappan v. Merchants' Bank*, 19 Wall. 490, 499; *State Railroad Tax Cases*, 92 U. S. 575, 607, 608; *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517, 524; *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. . . .

The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property, within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which

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these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the State courts, to questions under the Constitution and laws of the United States.

In the State Railroad Tax Cases, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital, and franchise, was assessed by the State Board of Equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the Constitution of the State; and Mr. Justice Miller, delivering judgment, said: —

“Another objection to the system of taxation by the State is, that the rolling stock, capital stock, and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city, or town, but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. *Green v. Van Buskirk*, 5 Wall. 312. Like all other laws of a State, it is, therefore, subject to legislative repeal, modification, or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation.” 92 U. S. 607, 608.

“It is further objected that the railroad track, capital stock, and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city, and town collects taxes according to the length

of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. *Delaware Railroad Tax*, 18 Wall. 206; *Erie Railroad v. Pennsylvania*, 21 Wall. 492." 92 U. S. 608, 611.

So in *Western Union Telegraph Co. v. Attorney-General of Massachusetts*, 125 U. S. 530, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the State, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

Even more in point is the case of *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the State of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said: —

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such

a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases, the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." 127 U. S. 123, 124.

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicile, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

Judgment affirmed.

MR. JUSTICE BRADLEY, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE HARLAN, dissenting.

I dissent from the judgment of the court in this case, and will state briefly my reasons. I concede that all property, personal as well as real, within a State, and belonging there, may be taxed by the State. Of that there can be no doubt. But where property does not belong in the State another question arises. It is the question of the jurisdiction of the State over the property. It is stated in the opinion of the court as a fundamental proposition on which the opinion really turns that all personal as well as real property within a State is subject to the laws thereof. I conceive that that proposition is not maintainable as a general and absolute proposition. Amongst independent nations, it is true, persons and property within the territory of a nation are subject to its laws, and it is responsible to other nations for any injustice it may do to the persons or property of such other nations. This is a rule of international law. But the States of this government are not independent nations. There is such a thing as a Constitution of the United States, and there is such a thing as a government of the United States, and there are many things, and many persons, and many articles of property that a State cannot lay the weight of its finger upon, because it would be contrary to the Constitution of the United States. Certainly, property merely carried through a State cannot be taxed by the State. Such a tax would be a duty — which a State cannot impose.

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If a drove of cattle is driven through Pennsylvania from Illinois to New York, for the purpose of being sold in New York, whilst in Pennsylvania it may be subject to the police regulations of the State, but it is not subject to taxation there. It is not generally subject to the laws of the State as other property is. So if a train of cars starts at Cincinnati for New York and passes through Pennsylvania, it may be subject to the police regulations of that State whilst within it, but it would be repugnant to the Constitution of the United States to tax it. We have decided this very question in the case of *State Freight Tax*, 15 Wall. 232. The point was directly raised and decided that property on its passage through a State in the course of interstate commerce cannot be taxed by the State, because taxation is incidentally regulation, and a State cannot regulate interstate commerce. The same doctrine was recognized in *Coe v. Errol*, 116 U. S. 517.

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And surely a State cannot interfere with the officers of the United States, in the performance of their duties, whether acting under the Judicial, Military, Postal, or Revenue Departments. They are entirely free from State control. So a citizen of the United States, or any other person, in the performance of any duty, or in the exercise of any privilege, under the Constitution or laws of the United States, is absolutely free from State control in relation to such matters. So that the general proposition, that all persons and personal property within a State is subject to the laws of the State, unless materially modified, cannot be true.

But, when personal property is permanently located within a State for the purpose of ordinary use or sale, then, indeed, it is subject to the laws of the State and to the burdens of taxation; as well when owned by persons residing out of the State, as when owned by persons residing in the State. It has then acquired a *situs* in the State where it is found.

A man residing in New York may own a store, a factory, or a mine in Alabama, stocked with goods, utensils, or materials for sale or use in that State. There is no question that the *situs* of personal property so situated is in the State where it is found, and that it may be subjected to double taxation, — in the State of the owner's residence, as a part of the general mass of his estate; and in the State of its *situs*. Although this is a consequence which often bears hardly on the owner, yet it is too firmly sanctioned by the law to be disturbed, and no remedy seems to exist but a sense of equity and justice in the legislatures of the several States. The rule would undoubtedly be more just if it made the property taxable, like lands and real estate, only in the place where it is permanently situated.

Double
Taxation
① Personal tax
② Prop Tax

Personal as well as real property may have a *situs* of its own, independent of the owner's residence, even when employed in interstate or foreign commerce. An office or warehouse, connected with a steamship line, or with a continental railway, may be provided with furniture and all the apparatus and appliances usual in such establishments. Such

property would be subject to the *lex rei sitæ* and to local taxation, though solely devoted to the purposes of the business of those lines. But the ships that traverse the sea, and the cars that traverse the land, in those lines, being the vehicles of commerce, interstate or foreign, and intended for its movement from one State or country to another, and having no fixed or permanent *situs* or home, except at the residence of the owner, cannot, without an invasion of the powers and duties of the federal government, be subjected to the burdens of taxation in the places where they only go or come in the transaction of their business, except where they belong. *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *Transportation Co. v. Wheeling*, 99 U. S. 278. To contend that there is any difference between cars or trains of cars and ocean steamships in this regard, is to lose sight of the essential qualities of things. This is a matter that does not depend upon the affirmative action of Congress. The regulation of ships and vessels, by act of Congress, does not make them the instruments of commerce. They would be equally so if no such affirmative regulations existed. For the States to interfere with them in either case would be to interfere with, and to assume the exercise of, that power which, by the Constitution, has been surrendered by the States to the government of the United States, namely, the power to regulate commerce.

Reference is made in the opinion of the court to the case of *Railroad Company v. Maryland*, 21 Wall. 456, in which it was said that commerce on land between the different States is strikingly dissimilar in many respects from commerce on water; but that was said in reference to the highways of transportation in the two cases, and the difference of control which the State has in one case from that which it can possibly have in the other. A railroad is laid on the soil of the State, by virtue of authority granted by the State, and is constantly subject to the police jurisdiction of the State; whilst the sea and navigable rivers are highways created by nature, and are not subject to State control. The question in that case related to the power of the State over its own corporation, in reference to its rate of fares and the remuneration it was required to pay to the State for its franchises, — an entirely different question from that which arises in the present case.

Reference is also made to expressions used in the opinion in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, which, standing alone, would seem to concede the right of a State to tax foreign corporations engaged in foreign or interstate commerce, if such property is within the jurisdiction of the State. But the whole scope of that opinion is to show that neither the vehicles of commerce coming within the State, nor the capital of such corporations, is taxable there; but only the property having a *situs* there, as the wharf used for landing passengers and freight. The entire series of decisions to that effect are cited and relied on.

Of course I do not mean to say that either railroad cars or ships are

to be free from taxation, but I do say that they are not taxable by those States in which they are only transiently present in the transaction of their commercial operations. A British ship coming to the harbor of New York from Liverpool ever so regularly and spending half its time (when not on the ocean) in that harbor, cannot be taxed by the State of New York (harbor, pilotage, and quarantine dues not being taxes). So New York ships plying regularly to the port of New Orleans, so that one of the line may be always lying at the latter port, cannot be taxed by the State of Louisiana. (See cases above cited). No more can a train of cars belonging in Pennsylvania, and running regularly from Philadelphia to New York, or to Chicago, be taxed by the State of New York, in the one case, or by Illinois, in the other. If it may lawfully be taxed by these States, it may lawfully be taxed by all the intermediate States, New Jersey, Ohio, and Indiana. And then we should have back again all the confusion and competition and State jealousies which existed before the adoption of the Constitution, and for putting an end to which the Constitution was adopted.

In the opinion of the court it is suggested that if all the States should adopt as equitable a rule of proportioning the taxes on the Pullman Company as that adopted by Pennsylvania, a just system of taxation of the whole capital stock of the company would be the result. Yes, if—! But Illinois may tax the company on its whole capital stock. Where would be the equity then? This, however, is a consideration that cannot be compared with the question as to the power to tax at all, — as to the relative power of the State and general governments over the regulation of internal commerce, — as to the right of the States to resume those powers which have been vested in the government of the United States.

It seems to me that the real question in the present case is as to the situs of the cars in question. They are used in interstate commerce, between Pennsylvania, New York, and the Western States. Their legal *situs* no more depends on the States or places where they are carried in the course of their operations than would that of any steamboats employed by the Pennsylvania Railroad Company to carry passengers on the Ohio or Mississippi. If such steamboats belonged to a company located at Chicago, and were changed from time to time as their condition as to repairs and the convenience of the owners might render necessary, is it possible that the States in which they were running and landing in the exercise of interstate commerce could subject them to taxation? No one, I think, would contend this. It seems to me that the cars in question belonging to the Pullman Car Company are in precisely the same category.

BLACKSTONE v. MILLER.

SUPREME COURT OF THE UNITED STATES. 1903.

[Reported 188 U. S. 189.]

HOLMES, J. This is a writ of error to the Surrogate's Court of the county of New York. It is brought to review a decree of the court, sustained by the Appellate Division of the Supreme Court, 69 App. Div. 127, and by the Court of Appeals, 171 N. Y. 682, levying a tax on the transfer by will of certain property of Timothy B. Blackstone, the testator, who died domiciled in Illinois. The property consisted of a debt of \$10,692.21, due to the deceased by a firm, and of the net sum of \$4,843,456.72, held on a deposit account by the United States Trust Company of New York. The objection was taken seasonably upon the record that the transfer of this property could not be taxed in New York consistently with the Constitution of the United States.

The deposit in question represented the proceeds of railroad stock sold to a syndicate and handed to the Trust Company, which, by arrangement with the testator, held the proceeds subject to his order, paying interest in the meantime. Five days' notice of withdrawal was required, and if a draft was made upon the company, it gave its check upon one of its banks of deposit. The fund had been held in this way from March 31, 1899, until the testator's death on May 26, 1900. It is probable, of course, that he did not intend to leave the fund there forever and that he was looking out for investments, but he had not found them when he died. The tax is levied under a statute imposing a tax "upon the transfer of any property, real or personal. . . . 2. When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death." Laws of 1896, c. 908, § 220, amended, Laws of 1897, c. 284; 3 Birdseye's Stat. 3d ed. 1901, p. 3592. The whole succession has been taxed in Illinois, the New York deposit being included in the appraisal of the estate. It is objected to the New York tax that the property was not within the State, and that the courts of New York had no jurisdiction; that if the property was within the State it was only transitorily there, *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, 599, 600, that the tax impairs the obligation of contracts, that it denies full faith and credit to the judgment taxing the inheritance in Illinois, that it deprives the executrix and legatees of privileges and immunities of citizens of the State of New York, and that it is contrary to the Fourteenth Amendment.

In view of the State decisions it must be assumed that the New York statute is intended to reach the transfer of this property if it can be reached. *New Orleans v. Stempel*, 175 U. S. 309, 316; *Morley v. Lake Shore & Michigan Southern Railway Co.*, 146 U. S. 162, 166. We also must take it to have been found that the property was not in

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transitu in such a sense as to withdraw it from the power of the State, if otherwise the right to tax the transfer belonged to the State. The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year, so that this finding at least was justified. *Kelley v. Rhoads*, 188 U. S. 1, and *Diamond Match Co. v. Village of Ontonagon*, 188 U. S. 84, present term. Both parties agree with the plain words of the law that the tax is a tax upon the transfer, not upon the deposit, and we need spend no time upon that. Therefore the naked question is whether the State has a right to tax the transfer by will of such deposit.

The answer is somewhat obscured by the superficial fact that New York, like most other States, recognizes the law of the domicile as the law determining the right of universal succession. The domicile, naturally, must control a succession of that kind. Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important. To a considerable, although more or less varying, extent, the succession determined by the law of the domicile is recognized in other jurisdictions. But it hardly needs illustration to show that the recognition is limited by the policy of the local law. Ancillary administrators pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domicile. The title of the principal administrator, or of a foreign assignee in bankruptcy, another type of universal succession, is admitted in but a limited way or not at all. See *Crapo v. Kelly*, 16 Wall. 610; *Chipman v. Manufacturers' National Bank*, 156 Mass. 147, 148, 149.

To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession tax there. *Eidman v. Martinez*, 184 U. S. 578, 586, 587, 592. See *Mager v. Grima*, 8 How. 490, 493; *Coe v. Errol*, 116 U. S. 517, 524; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; and for state decisions *Matter of Estate of Romaine*, 127 N. Y. 80; *Callahan v. Woodbridge*, 171 Mass. 593; *Greves v. Shaw*, 173 Mass. 205; *Allen v. National State Bank*, 92 Md. 509.

No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at

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the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law. *Coe v. Errol*, 116 U. S. 517, 524; *Knowlton v. Moore*, 178 U. S. 41.

The question, then, is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. *Matter of Houdayer*, 150 N. Y. 37; *New Orleans v. Stampet*, 175 U. S. 309, 316; *City National Bank v. Charles Baker Co.*, 180 Mass. 40, 42. In view of these cases, and the decision in the present case, which followed them, a not very successful attempt was made to show that by reason of the facts which we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank. We shall not stop to discuss this aspect of the case, because we prefer to decide it upon a broader view.

If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. *United States v. Perkins*, 163 U. S. 625, 628, 629; *McCulloch v. Maryland*, 4 Wheat. 316, 429. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, Rock Island & Pacific Ry. Co. v. Sturm*, 174 U. S. 710. See *Wyman v. Halstead*, 109 U. S. 654. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one

case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way.

There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds*, 15 Wall. 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass. 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases. *Savings & Loan Society v. Multnomah County*, 169 U. S. 421, 428; *New Orleans v. Stempel*, 175 U. S. 309, 319, 320.

In the case at bar the law imposing the tax was in force before the deposit was made, and did not impair the obligation of the contract, if a tax otherwise lawful ever can be said to have that effect. *Pinney v. Nelson*, 183 U. S. 144, 147. The fact that two States, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Coe v. Errol*, 116 U. S. 517, 524; *Knowlton v. Moore*, 178 U. S. 53. The universal succession is taxed in one State, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money. See *Adams v. Batchelder*, 173 Mass. 258. The same considerations answer the argument that due faith and credit are not given to the judgment in Illinois. The tax does not deprive the plaintiff in error of any of the privileges and immunities of the citizens of New York. It is no such deprivation that if she had lived in New York the tax on the transfer of the deposit would have been part of the tax on the inheritance as a whole. See *Mager v. Grima*, 8 How. 490; *Brown v. Houston*, 114 U. S. 622, 635; *Wallace v. Myers*, 38 Fed. Rep. 184. It does not violate the Fourteenth Amendment. See *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283. Matters of state procedure and the correctness of the New York decree or judgment, apart from specific constitutional objections, are not open here. As we have said, the question whether the property was to be regarded as *in transitu*, if material, must be regarded as found against the plaintiff in error.

Decree affirmed.

MR. JUSTICE WHITE dissents.

UNION TRANSIT CO. v. KENTUCKY.

SUPREME COURT OF THE UNITED STATES. 1905.

[Reported 199 U. S. 194.]

Unquestioned Tax

BROWN, J. In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, permanently located in other States, and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the Fourteenth Amendment.

Section 4020 of the Kentucky statutes, under which this assessment was made, provides that "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, . . . shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

That the property taxed is within this description is beyond controversy. The constitutionality of the section was attacked not only upon the ground that it denied to the Transit Company due process of law, but also the equal protection of the laws, in the fact that railroad companies were only taxed upon the value of their rolling stock used within the State which was determined by the proportion which the number of miles of the railroad in the State bears to the whole number of miles operated by the company.

The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. *Railroad Company v. Jackson*, 7 Wall. 262; *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Tappan v. Merchants' National Bank*, 19 Wall. 490, 499; *Delaware &c. R. R. Co. v. Pennsylvania*, 198 U. S. 341, 358. In *Chicago &c. R. R. Co. v. Chicago*, 166 U. S. 226, it was held, after full consideration, that the taking of private property without compensation was a denial of due

process within the Fourteenth Amendment. See also *Davidson v. New Orleans*, 96 U. S. 97, 102; *Missouri Pacific Railway v. Nebraska*, 164 U. S. 403, 417; *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 519.

Most modern legislation upon this subject has been directed (1) to the requirement that every citizen shall disclose the amount of his property subject to taxation and shall contribute in proportion to such amount; and (2) to the avoidance of double taxation. As said by Adam Smith in his "Wealth of Nations," Book V., Ch. 2, Pt. 2, "the subjects of every State ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interest in the estate. In the observation or neglect of this maxim consists what is called equality or inequality of taxation."

But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. *Kelly v. Pittsburgh* 104 U. S. 78; *Amesbury Nail Factory Co. v. Weed*, 17 Mass. 53; *Thomas v. Gay*, 169 U. S. 264; *Louisville & C. R. R. Co. v. Barber Asphalt Co.* 197 U. S. 430. Subject to these individual exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. *Norwood v. Baker*, 172 U. S. 269. It is often said protection and payment of taxes are correlative obligations.

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know

of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. It is said by this court in the Foreign-held Bond Case, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in *Louisville &c. Ferry Co. v. Kentucky*, 188 U. S., 385, 396: "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government." See also *McCulloch v. Maryland*, 4 Wheat. 316, 429; *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 599; *St. Louis v. Ferry Co.*, 11 Wall. 423, 429, 431; *Morgan v. Parham*, 16 Wall. 471, 476.

Respecting this, there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such has been the repeated rulings of this court. *Tappan v. Merchants' National Bank*, 19 Wall. 490; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Bonaparte v. Tax Court*, 104 U. S. 592; *Sturgis v. Carter*, 114 U. S. 511; *Kidd v. Alabama*, 188 U. S. 730; *Blackstone v. Miller*, 188 U. S. 189.

If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicile or the *situs*. Of course, we do not enter into a consideration of the question, so much discussed by polit-

ical economists, of the double taxation involved in taxing the property from which these securities arise, and also the burdens upon such property, such as mortgages, shares of stock and the like — the securities themselves.

The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs*, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicile of the owner. We have, ourselves, held in a number of cases that such property permanently located in a State other than that of its owner is taxable there. *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Railroad Company v. Peniston*, 18 Wall. 5; *American Refrigerator Transit Company v. Hall*, 174 U. S. 70; *Pittsburgh Coal Company v. Bates*, 156 U. S. 577; *Old Dominion Steamship Company v. Virginia*, 198 U. S. 299. We have also held that, if a corporation be engaged in running railroad cars into, through, and out of the State, and having at all times a large number of cars within the State, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run. *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18.

There are doubtless cases in the State reports announcing the principle that the ancient maxim of *mobilia sequuntur personam* still applies to personal property, and that it may be taxed at the domicile of the owner, but upon examination they all or nearly all relate to intangible property, such as stocks, bonds, notes, and other choses in action. We are cited to none applying this rule to tangible property, and after a careful examination have not been able to find any wherein the question is squarely presented, unless it be that of *Wheaton v. Mickel*, 63 N. J. Law, 525, where a resident of New Jersey was taxed for certain coastwise and seagoing vessels located in Pennsylvania. It did not appear, however, that they were permanently located there. The case turned upon the construction of a State statute, and the question of constitutionality was not raised. If there are any other cases holding that the maxim applies to tangible personal property, they are wholly exceptional, and were decided at a time when personal property was comparatively of small amount, and consisted principally of stocks in trade, horses, cattle, vehicles, and vessels engaged in navigation. But in view of the enormous increase of such property since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and correlatively to exempt at the domicile of

its owner. The cases in the State reports upon this subject usually turn upon the construction of local statutes granting or withholding the right to tax extra-territorial property, and do not involve the constitutional principle here invoked. Many of them, such, for instance, as *Blood v. Sayre*, 17 Vt. 609; *Preston v. Boston*, 12 Pickering, 7; *Pease v. Whitney*, 8 Mass. 93; *Gray v. Kettel*, 12 Mass. 161, turn upon the taxability of property where the owner is located in one, and the property in another, of two jurisdictions within the same State, sometimes even involving double taxation, and are not in point here.

One of the most valuable of the State cases is that of *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224, where, under the New York statute, it was held that the tangible property of a resident actually situated in another State or country was not to be included in the assessment against him. The statute declared that "all lands and all personal estate within this State" were liable for taxation, and it was said in a most instructive opinion by Chief Justice Comstock that the language could not be obscured by the introduction of a legal fiction about the *situs* of personal estate. It was said that this fiction involved the necessary consequence that "goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad;" and that the maxim *mobilia sequuntur personam* may only be resorted to when convenience and justice so require. The proper use of legal fiction is to prevent injustice, according to the maxim "*in fictione juris semper æquitas existat*." See *Eidman v. Martinez*, 184 U. S. 578; *Blackstone v. Miller*, 188 U. S. 189, 206. "No fiction," says Blackstone, "shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, which might result from a general rule of law." The opinion argues with great force against the injustice of taxing extra-territorial property, when it is also taxable in the State where it is located. Similar cases to the same effect are *People v. Smith*, 88 N. Y. 576; *City of New Albany v. Meekin*, 3 Indiana, 481; *Wilkey v. City of Pekin*, 19 Illinois, 160; *Johnson v. Lexington*, 14 B. Monroe, 521; *Catlin v. Hull*, 21 Vermont, 152; *Nashua Bank v. Nashua*, 46 N. H. 389.

In *Weaver's Estate v. State*, 110 Iowa, 328, it was held by the Supreme Court of Iowa that a herd of cattle within the State of Missouri belonging to a resident of Iowa, was not subject to an inheritance tax upon his decease. In *Commonwealth v. American Dredging Company*, 122 Penna. St. 386, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained outside of the state. It was said that the non-taxability of tangible personal property located permanently outside of the State was not "because of the technical principle that the *situs* of personal property is where the domicile of the owner is found. This rule is doubtless true as to intangible property, such as bonds, mortgages, and

other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property permanently located in another State. In such cases it is taxable within the jurisdiction where found, and is exempt at the domicile of the owner." The property in that case, however, was held not to be permanently outside of the State, and therefore not exempt from taxation. The rule, however, seems to be well settled in Pennsylvania that so much of the tangible property of a corporation as is situated in another State, and there employed in its corporate business, is not taxable in Pennsylvania. *Commonwealth v. Montgomery &c. Mining Co.*, 5 Pa. County Courts Rep. 89; *Commonwealth v. Railroad Co.*, 145 Pa. St. 96; *Commonwealth v. Westinghouse Mfg. Co.*, 151 Pa. St. 265; *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119. The rule is the same in New York. *Pacific Steamship Company v. Commissioners*, 46 How. Pr. 315.

But there are two recent cases in this court which we think completely cover the question under consideration and require the reversal of the judgment of the State court. The first of these is that of the *Louisville &c. Ferry Co. v. Kentucky*, 188 U. S. 385. That was an action to recover certain taxes imposed upon the corporate franchise of the defendant company, which was organized to establish and maintain a ferry between Kentucky and Indiana. The defendant was also licensed by the State of Indiana. We held that the fact that such franchise had been granted by the Commonwealth of Kentucky did not bring within the jurisdiction of Kentucky for the purpose of taxation the franchise granted to the same company by Indiana, and which we held to be an incorporeal hereditament derived from and having its legal *situs* in that State. It was adjudged that such taxation amounted to a deprivation of property without due process of law, in violation of the Fourteenth Amendment, as much so as if the State taxed the land owned by that company; and that the officers of the State had exceeded their power in taxing the whole franchise without making a deduction for that obtained from Indiana, the two being distinct, "although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways."

The other and more recent case is that of the *Delaware &c. Railroad Co. v. Pennsylvania*, 198 U. S. 841. That was an assessment upon the capital stock of the railroad company, wherein it was contended that the assessor should have deducted from the value of such stock certain coal mined in Pennsylvania and owned by it, but stored in New York, there awaiting sale, and beyond the jurisdiction of the commonwealth at the time appraisement was made. This coal was taxable, and in fact was taxed in the State where it rested for the purposes of sale at the time when the appraisement in question was made. Both this court and the Supreme Court of Pennsylvania had held that a tax on the corporate stock is a tax on the assets of the corporation

tax - not on
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issuing such stock. The two courts agreed in the general proposition that tangible property permanently outside of the State, and having no *situs* within the State, could not be taxed. But they differed upon the question whether the coal involved was permanently outside of the State. In delivering the opinion it was said: "However temporary the stay of the coal might be in the particular foreign States where it was resting at the time of the appraisal, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign States for purposes of taxation, and in truth it was there taxed. We regard this tax as in substance and in fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the State which thus assumes to tax it." The decision in that case was really broader than the exigencies of the case under consideration required, as the tax was not upon the personal property itself, but upon the capital stock of a Pennsylvania corporation, a part of which stock was represented by the coal, the value of which was held should have been deducted.

The adoption of a general rule that tangible personal property in other States may be taxed at the domicile of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other States or even in foreign countries, of stocks of goods and merchandise kept at branch establishments when already taxed at the State of their *situs*, but of that enormous mass of personal property belonging to railways and other corporations which might be taxed in the state where they are incorporated, though their charters contemplated the construction and operation of roads wholly outside the State, and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection. The propriety of such incorporations, where no business is done within the State, is open to a grave doubt, but it is possible that legislation alone can furnish a remedy.

Our conclusion upon this branch of the case renders it unnecessary to decide the second question, viz: Whether the Transit Company was denied the equal protection of the laws.

It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same State, which are controlled by different considerations.

We are of opinion that the cars in question, so far as they were located and employed in other States than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

MR. JUSTICE WHITE concurred in the result.

MR. JUSTICE HOLMES: It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment, and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed.

NEW YORK CENTRAL RAILROAD v. MILLER.

SUPREME COURT OF THE UNITED STATES. 1906.

[Reported 202 U. S. 584.]

HOLMES, J. These cases arise upon writs of certiorari, issued under the State law and addressed to the State comptroller for the time being, to revise taxes imposed upon the relator for the years 1900, 1901, 1902, 1903 and 1904 respectively. The tax was levied under New York Laws of 1896, c. 908, § 182, which, so far as material, is as follows: "Franchise Tax on Corporations.— Every corporation . . . incorporated . . . under . . . law in this State, shall pay to the State treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this State and upon each dollar of such amount," at a certain rate, if the dividends amount to six per cent or more upon the par value of such capital stock. "If such dividend or dividends amount to less than six per centum on the par value of the capital stock [as was the case with the relator], the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this State bears to the entire capital of the corporation." It is provided further by the same section that every foreign corporation, etc., "shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital employed by it within this State."

The relator is a New York corporation owning or hiring lines without as well as within the State, having arrangements with other carriers for through transportation, routing and rating, and sending its cars to points without as well as within the State, and over other lines as well as its own. The cars often are out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they return to the relator or the State. In short, by the familiar course of railroad business a considerable proportion of the relator's cars constantly is out of the State, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the State. This contention the comptroller disallowed.

The writ of certiorari in the earliest case, No. 81, with the return setting forth the proceedings of the comptroller, Knight, and the evidence

given before him, was heard by the Appellate Division of the Supreme Court, and a reduction of the amount of the tax was ordered. 75 App. Div. 169. On appeal the Court of Appeals ordered the proceedings to be remitted to the comptroller, to the end that further evidence might be taken upon the question whether any of the relator's rolling stock was used exclusively outside of the State, with directions that if it should be found that such was the fact the amount of the rolling stock so used should be deducted. 178 N. Y. 255. On rehearing of No. 81 and with it No. 82, before the comptroller, now Miller, no evidence was offered to prove that any of the relator's cars or engines were used continuously and exclusively outside of the State during the whole tax year. In the later cases it was admitted that no substantial amount of the equipment was so used during the similar period. But in all of them evidence was offered of the movements of particular cars, to illustrate the transfers which they went through before they returned, as has been stated, evidence of the relator's road mileage outside and inside of the State, and also evidence of the car mileage outside and inside of the State, in order to show, on one footing or the other, that a certain proportion of cars, although not the same cars, was continuously without the State during the whole tax year. The comptroller refused to make any reduction of the tax, and the case being taken up again, his refusal was affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals on the authority of the former decision. 89 App. Div. 127; 177 N. Y. 584. The later cases took substantially the same course. The relator saved the questions whether the statute as construed was not contrary to Article 1, § 8, of the Constitution of the United States, as to commerce among the States; Article 1, § 10, against impairing the obligation of contracts; Article 4, § 1, as to giving full faith and credit to the public acts of other States; and the Fourteenth Amendment. It took out writs of error and brought the cases here.

The argument for the relator had woven through it suggestions which only tended to show that the construction of the New York statute by the Court of Appeals was wrong. Of course if the statute as construed is valid under the Constitution, we are bound by the construction given to it by the State court. In this case we are to assume that the statute purports and intends to allow no deduction from the capital stock taken as the basis of the tax, unless some specific portion of the corporate property is outside of the State during the whole tax year. We must assume, further, that no part of the corporate property in question was outside of the State during the whole tax year. The proposition really was conceded, as we have said, and the evidence that was offered had no tendency to prove the contrary. If we are to suppose that the reports offered in evidence were accepted as competent to establish the facts which they set forth, still it would be going a very great way to infer from car mileage the average number or proportion of cars absent from the State. For, as was said by a witness, the reports show only that the cars made so many miles, but it might be ten or it

might be fifty cars that made them. Certainly no inference whatever could be drawn that the same cars were absent from the State all the time.

In view of what we have said it is questionable whether the relator has offered evidence enough to open the constitutional objections urged against the tax. But as it cannot be doubted, in view of the well-known course of railroad business, that some considerable proportion of the relator's cars always is absent from the State, it would be unsatisfactory to turn the case off with a merely technical answer, and we proceed. The most salient points of the relator's argument are as follows: This tax is not a tax on the franchise to be a corporation, but a tax on the use and exercise of the franchise of transportation. The use of this or any other franchise outside the State cannot be taxed by New York. The car mileage within the State and that upon other lines without the State afford a basis of apportionment of the average total of cars continuously employed by other corporations without the State, and the relator's road mileage within and without the State affords a basis of apportionment of its average total equipment continuously employed by it respectively within and without the State. To tax on the total value within and without is beyond the jurisdiction of the State, a taking of property without due process of law, and an unconstitutional interference with commerce among the States.

A part of this argument we have answered already. But we must go further. We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts it must be sustained by us. It is called a franchise tax in the act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, Lackawanna & Western R. R. v. Pennsylvania*, 198 U. S. 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case. See *People v. Morgan*, 178 N. Y. 433, 439. If it is a tax on any franchise which the State of New York gave, and the same State could take away, it stands at least no worse. The relator's argument assumes that it must be regarded as a tax of a particular kind, in order to invalidate it, although it might be valid if regarded as the State court regards it.

Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 201, 211; *Delaware, Lackawanna & Western R. R. v. Pennsylvania*, 198 U. S. 341; *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought

back. Using the language of domicil, which now so frequently is applied to inanimate things, the State of origin remains the permanent *situs* of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & Lord Tie Co. v. Kentucky*, May 21, 1906, 202 U. S. 409. See also *Union Refrigerator Transit Co. v. Kentucky* 199 U. S. 194, 208, 209.

It was suggested that this case is but the complement of *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, and that as there a tax upon a foreign corporation was sustained, levied on such proportion of its capital stock as the miles of track over which its cars were run within the State bore to the whole number of miles over which its cars were run, so here in the domicil of such a corporation there should be an exemption corresponding to the tax held to be lawfully levied elsewhere. But in that case it was found that the "cars used in this State have, during all the time for which tax is charged, been running into, through and out of the State." The same cars were continuously receiving the protection of the State and, therefore, it was just that the State should tax a proportion of them. Whether if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home.

Judgments affirmed.

METROPOLITAN LIFE INSURANCE COMPANY v. NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES. 1907.

[Reported 205 U. S. 895.]

MOODY, J. This is a writ of error to review the judgment of the Supreme Court of Louisiana, which sustained a tax on the "credits, money loaned, bills receivable," etc., of the plaintiff in error, a life insurance company incorporated under the laws of New York, where it had its home office and principal place of business. It issued policies of life insurance in the State of Louisiana and, for the purpose of doing that and other business, had a resident agent, called a superintendent, whose duty it was to superintend the company's business generally in the State. The agent had a local office in New Orleans. The company was engaged in the business of lending money to the holders

of its policies, which, when they had reached a certain point of maturity, were regarded as furnishing adequate security for loans. The money lending was conducted in the following manner: The policy holders desiring to obtain loans on their policies applied to the company's agent in New Orleans. If the agent thought a loan a desirable one he advised the company of the application by communicating with the home office in New York, and requested that the loan be granted. If the home office approved the loan the company forwarded to the agent a check for the amount, with a note to be signed by the borrower. The agent procured the note to be signed, attached the policy to it, and forwarded both note and policy to the home office in New York. He then delivered to the borrower the amount of the loan. When interest was due upon the notes it was paid to the agent and by him transmitted to the home office. It does not appear whether or not the notes were returned to New Orleans for the endorsement of the payments of interest. When the notes were paid it was to the agent, to whom they were sent to be delivered back to the makers. At all other times the notes and policies securing them were kept at the home office in New York. The disputed tax was not *eo nomine* on these notes, but was expressed to be on "credits, money loaned, bills receivable," etc., and its amount was ascertained by computing the sum of the face value of all the notes held by the company at the time of the assessment. The tax was assessed under a law, Act 170 of 1898, which provided for a levy of annual taxes on the assessed value of all property situated within the State of Louisiana, and in Section 7 provided as follows:

"That it is the duty of the tax assessors throughout the State to place upon the assessment list all property subject to taxation, including merchandise or stock in trade on hand at the date of listing within their respective districts or parishes. . . . *And provided further*, In assessing mercantile firms the true intent and purpose of this act shall be held to mean the placing of such value upon stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, &c., as will represent in their aggregate a fair average on the capital, both cash and credits, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this State business interests that may claim domicile elsewhere, the intent and purpose being that no non-resident, either by himself or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this State are hereby declared as assessable within this State and at the business domicile of said non-resident, his agent or representative."

The evident purpose of this law is to lay the burden of taxation equally upon those who do business within the State. It requires that in the valuation for the purposes of taxation of the property of mercantile firms the stock, goods, and credits shall be taken into account, to

the end that the average capital employed in the business shall be taxed. This method of assessment is applied impartially to the citizens of the State and to the citizens of other States or countries doing business, personally or through agents, within the State of Louisiana. To accomplish this result, the law expressly provides that "all bills receivable, obligations or credits arising from the business done in this State shall be assessable at the business domicile of the resident." Thus it is clear that the measure of the taxation designed by the law is the fair average of the capital employed in the business. Cash and credits and bills receivable are to be taken into account merely because they represent the capital and are not to be omitted because their owner happens to have a domicile in another State. The law was so construed by the Supreme Court of Louisiana, where, in sustaining the assessment, it was said:

"There can be no doubt that the seventh section of the act of 1898, quoted in the judgment of the District Court, announced the policy of the State touching the taxation of credits and bills of exchange representing an amount of the property of non-residents equivalent or corresponding to said bills or credits which was utilized by them in the prosecution of their business in the State of Louisiana. The evident object of the statute was to do away with discrimination theretofore existing in favor of non-residents as against residents, and place them on an equal footing. The statute was not arbitrary, but a legitimate exercise of legislative power and discretion."

The tax was levied in obedience to the law of the State, and the only question here is whether there is anything in the Constitution of the United States which forbids it. The answer to that question depends upon whether the property taxed was within the territorial jurisdiction of the State. Property situated without that jurisdiction is beyond the State's taxing power, and the exaction of a tax upon it is in violation of the Fourteenth Amendment to the Constitution. *Louisville Ferry Co. v. Kentucky*, 188 U. S. 385; *Delaware, &c., Railroad Co. v. Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194. But personal property may be taxed in its permanent abiding place, although the domicile of the owner is elsewhere. It is usually easy to determine the taxable *situs* of tangible personal property. But where personal property is intangible, and consists, as in this case, of credits reduced to the concrete form of promissory notes, the inquiry is complicated, not only by the fiction that the domicile of personal property follows that of its owner, but also by the doctrine, based upon historical reasons, that where debts have assumed the form of bonds or other specialties, they are regarded for some purposes as being the property itself, and not the mere representative of it, and may have a taxable *situs* of their own. How far promissory notes are assimilated to specialties in respect of this doctrine, need not now be considered.

The question in this case is controlled by the authority of the previous decisions of this court. Taxes under this law of Louisiana have

been twice considered here, and assessments upon credits arising out of investments in the State have been sustained. A tax on credits evidenced by notes secured by mortgages was sustained where the owner, a non-resident who had inherited them, left them in Louisiana in the possession of an agent, who collected the principal and interest as they became due. *New Orleans v. Stempel*, 175 U. S. 309. Again, it was held that where a foreign banking company did business in New Orleans, and through an agent lent money which was evidenced by checks drawn upon the agent, treated as overdrafts and secured by collateral, the checks and collateral remaining in the hands of the agent until the transactions were closed, the credits thus evidenced were taxable in Louisiana. *Board of Assessors v. Comptoir National*, 191 U. S. 388. In both of these cases the written evidences of the credits were continuously present in the State, and their presence was clearly the dominant factor in the decisions. Here the notes, though present in the State at all times when they were needed, were not continuously present, and during the greater part of their lifetime were absent and at their owner's domicile. Between these two decisions came the case of *Bristol v. Washington County*, 177 U. S. 133. It appeared in that case that a resident of New York was engaged through an agent in the business of lending money in Minnesota, secured by mortgages on real property. The notes were made to the order of the non-resident, though payable in Minnesota, and the mortgages ran to her. The agent made the loans, took and kept the notes and securities, collected the interest and received payment. The property thus invested continued to be taxed without protest in Minnesota, until finally the course of business was changed by sending the notes to the domicile of the owner in New York, where they were kept by her. The mortgages were, however, retained by the agent in Minnesota, though his power to discharge them was revoked. The interest was paid to the agent and the notes forwarded to him for collection when due. Taxes levied after this change in the business were in dispute in the case. In delivering the opinion of the court, Mr. Chief Justice Fuller said: "Nevertheless, the business of loaning money through the agency in Minnesota was continued during all these years, just as it had been carried on before, and we agree with the Circuit Court that the fact that the notes were sent to Mrs. Bristol in New York, and the fact of the revocation of the power of attorney, did not exempt these investments from taxation under the statutes as expounded in the decisions to which we have referred. . . ."

Referring to the case of *New Orleans v. Stempel*, the Chief Justice said:

"There the moneys, notes, and other evidences of credits were in fact in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule.

"Persons are not permitted to avail themselves, for their own benefit,

of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public need, through action of this sort, whether taken for convenience or by design."

Accordingly it was held that the tax was not forbidden by the Federal Constitution.

In this case, the controlling consideration was the presence in the State of the capital employed in the business of lending money, and the fact that the notes were not continuously present was regarded as immaterial. It is impossible to distinguish the case now before us from the Bristol case. Here the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the State. The notes and securities were in Louisiana whenever the business exigencies required them to be there. Their removal with the intent that they shall return whenever needed, their long continued though not permanent absence, cannot have the effect of releasing them as the representatives of investments in business in the State from its taxing power. The law may well regard the place of their origin, to which they intend to return, as their true home, and leave out of account temporary absences, however long continued. Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the *situs* of the latter, can be allowed to obscure the truth. *Blackstone v. Miller*, 188 U. S. 189. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the State. The State undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the State had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the State evidences of credits in the form of notes. Under such circumstances, they have a taxable *situs* in the State of their origin.

The judgment of the Supreme Court of Louisiana is

Affirmed.

IN RE ESTATE OF SWIFT.

COURT OF APPEALS OF NEW YORK. 1893.

[Reported 137 New York, 77.]

GRAY, J. James T. Swift died in July, 1890, being a resident of this State and leaving a will, by which he made a disposition of all his property among relatives. After many legacies of money and of various articles of personal property, he directed a division of his residuary estate into four portions, and he devised and bequeathed one portion to each of four persons named. The executors were given a power of sale for the purpose of paying the legacies and of making the distribution of the estate. At the time of his death, the testator's estate included certain real estate and tangible personal property in chattels, situated within the State of New Jersey, which were realized upon by the executors and converted into moneys in hand. When, upon their application, an appraisement was had of the estate, in order to fix its value under the requirements of the law taxing gifts, legacies, and inheritances, the surrogate of the county of New York, before whom the matter came, held, with respect to the appraisement, that the real and personal property situated without the State of New York were not subject to appraisal and tax under the law, and the exceptions taken by the comptroller of the city of New York to that determination raise the first and the principal question which we shall consider.

*Confused nature
of tax with method
of collecting*

Surrogate Ransom's opinion, which is before us in the record, contains a careful review of the legal principles which limit the right to impose the tax, and his conclusions are as satisfactory to my mind, as they evidently were to the minds of the learned justices of the General Term of the Supreme Court, who agreed in affirming the surrogate's decree upon his opinion.

The Attorney-General has argued that this law, commonly called the collateral inheritance tax law, imposes not a property tax but a charge for the privilege of acquiring property, and, as I apprehend it, the point of his argument is that, as there is no absolute right to succeed to property, the State has a right to annex a condition to the permission to take by will, or by the intestate laws, in the form of a tax, to be paid by the persons for whose benefit the remedial legislation has been enacted. That is, substantially, the way in which he puts the proposition, and if the premise be true that the tax imposed is upon the privilege to acquire, and, as he says in his brief, is like "a duty imposed, payable by the beneficiary," possibly enough, we should have to agree with him. We might think, in that view of the act, that the situs of property in a foreign jurisdiction was not a controlling circumstance. But if we take up the provisions of the law by which the tax is imposed, and if we consider them as they are framed and the prin-

ciple which then seems to underlie the peculiar system of taxation created, I do not think that his essential proposition finds adequate support. The law in force at the time of the decease of the testator is contained in chapter 713 of the Laws of 1887, amending chapter 483 of the Laws of 1885, and is entitled "An act to tax gifts, legacies, and collateral inheritances in certain cases."

By the first section it is provided that "all property which shall pass by will . . . from any person who may die seized or possessed of the same, while a resident of this State, or, if such decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State, . . . shall be and is subject to a tax . . . to be paid . . . for the use of the State," etc.

In the fourth section it is provided that "all taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent," etc.

By the sixth section, it is provided that the executor shall "deduct the tax from the legacy or property, subject to said tax, or if the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee, or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon," etc. The language of the act has been justly condemned, for being involved and difficult to read clearly; but considering the language employed in these and in other sections of the law, in its ordinary sense, I think we would at once say that if the legislature had not actually imposed a tax upon the property itself, upon the death of its owner, it had certainly intended to impose a tax upon its succession, which was to be a charge upon the property, and which operated, in effect, to diminish *pro tanto* its value, or the capital, coming to the new owner under a will, or by the intestate laws. Could any one say, after reading the provisions of this law, that it was the legatee, or person entitled, who was taxed? I doubt it. Property, which was the decedent's at the time of his death, is subjected to the payment of a tax. The tax is to be deducted from the legacy; or, when deduction is not possible from the legacy not being in money, and a collection from the legatee or the person entitled to the property is authorized to be made, the tax so to be collected is described as "the tax thereon," that is, on the property.

If it should be said that such an interpretation of the law is in conflict with a doctrine which some judges have asserted, respecting the nature of this tax, I think it might be sufficient to say that the phraseology of the New York law differs, more or less, from that of other States, and seems peculiarly to charge the subject of the succession with the payment of the tax. But I do not think it at all important to our decision here that we should hold it to be a tax upon property precisely.

A precise definition of the nature of this tax is not essential, if it is

susceptible of exact definition. Thus far, in this court, we have not thought it necessary, in the cases coming before us, to determine whether the object of taxation is the property which passes, or not; though, in some, expressions may be found which seem to regard the tax in that light. *Matter of McPherson*, 104 N. Y. 306; *Matter of Enston*, 113 id. 174; *Matter of Sherwell*, 125 id. 379; *Matter of Romaine*, 127 id. 80; and *Matter of Stewart*, 131 id. 274. The idea of this succession tax, as we may conveniently term it, is more or less compound; the principal idea being the subjection of property, ownership of which has ceased by reason of the death of its owner, to a diminution, by the State reserving to itself a portion of its amount, if in money, or of its appraised value, if in other forms of property. The accompanying, or the correlative idea should necessarily be that the property, over which such dominion is thus exercised, shall be within the territorial limits of the State at its owner's death, and, therefore, subject to the operation and the regulation of its laws. The State, in exercising its power to subject realty, or tangible property, to the operation of a tax, must, by every rule, be limited to property within its territorial confines.

The question here does not relate to the power of the State to tax its residents with respect to the ownership of property situated elsewhere. That question is not involved. The question is whether the legislature of the State, in creating this system of taxation of inheritances, or testamentary gifts, has not fixed as the standard of right the property passing by will, or by the intestate laws.

What has the State done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease, allowing only the balance to pass in the way directed by testator, or permitted by its intestate law, and while, in so doing, it is exercising an inherent and sovereign right, it seems very clear to my mind that it affects only property which lies within it, and, consequently, is subject to its right of eminent domain. The theory of sovereignty, which invests the State with the right and the power to permit and to regulate the succession to property upon its owner's decease, rests upon the fact of an actual dominion over that property. In exercising such a power of taxation, as is here in question, the principle, obviously, is that all property in the State is tributary for such a purpose and the sovereign power takes a portion, or percentage of the property, not because the legatee is subject to its laws and to the tax, but because the State has a superior right, or ownership, by force of which it can intercept the property, upon its owner's death, in its passage into an ownership regulated by the enabling legislation of the State.

The rules of taxation have become pretty well settled, and it is fundamental among them that there shall be jurisdiction over the subject taxed; or, as it has been sometimes expressed, the taxing power of the State is coextensive with its sovereignty. It has not the power to

tax directly either lands or tangible personal property situated in another State or country. As to the latter description of property no fiction transmuting its situs to the domicile of the owner is available, when the question is one of taxation. In this connection the observations of Chief Judge Comstock, in *Hoyt v. Commissioners of Taxes*, 28 N. Y. 224, and of some text-writers, are not inappropriately referred to. He had said that lands and personal property having an actual situation within the State are taxable, and, by a necessary implication, that no other property can be taxed. He says, further, "If we say that taxation is on the person in respect to the property, we are still without a reason for assessing the owner resident here in respect to one part of his estate situated elsewhere and not in respect to another part. Both are the subjects of taxation in the foreign jurisdiction."

In Judge Cooley's work on Taxation it is remarked (p. 159) that "a State can no more subject to its power a single person, or a single article of property, whose residence or situs is in another State, than it can subject all the citizens, or all the property of such other State to its power."

Judge Cooley had reference in his remarks to the case of bonds of a railroad; for he cites the case of "the State Tax on Foreign-Held Bonds" in the United States Supreme Court (15 Wallace, 800), where Mr. Justice Field delivered the opinion, and, in the course of it, observed that "the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

Judge Story, in his work on the Conflict of Laws, speaking of the subject of jurisdiction in regard to property, said (section 550) that the legal fiction as to the situs of movables yields when it is necessary for the purpose of justice, and, further, "a nation within whose territory any personal property is actually situated has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there."

The proposition which suggests itself from reasoning, as from authority, is that the basis of the power to tax is the fact of an actual dominion over the subject of taxation at the time the tax is to be imposed.

The effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons. If it is called a tax upon the succession to the ownership of property, still it relates to and subjects the property itself, and when that is without the jurisdiction of the State, inasmuch as the succession is not of property within the dominion of the State, succession to it cannot be said to occur by permission of the State. As to lands this is clearly the case, and rights in or power over them are derived from or through the laws of the foreign State or country. As to goods and chattels it is true; for their transmission abroad is subject to the permission of and regulated

by the laws of the State or country where actually situated. Jurisdiction over them belongs to the courts of that State or country for all purposes of policy, or of administration in the interests of its citizens, or of those having enforceable rights, and their surrender, or transmission, is upon principles of comity.

When succession to the ownership of property is by the permission of the State, then the permission can relate only to property over which the State has dominion and as to which it grants the privilege or permission.

Nor is the argument available that, by the power of sale conferred upon the executors, there was an equitable conversion worked of the lands in New Jersey, as of the time of the testator's death, and, hence, that the property sought to be reached by the tax, in the eye of the law, existed as cash in this State in the executor's hands, at the moment of the testator's death. There might be some doubt whether the main proposition in the argument is quite correct, and whether the land did not vest in the residuary legatees, subject to the execution of the power of sale. But it is not necessary to decide that question. Neither the doctrine of equitable conversion of lands, nor any fiction of situs of movables, can have any bearing upon the question under advisement. The question of the jurisdiction of the State to tax is one of fact and cannot turn upon theories or fictions; which, as it has been observed, have no place in a well adjusted system of taxation.

We can arrive at no other conclusion, in my opinion, than that the tax provided for in this law is only enforceable as to property which, at the time of its owner's death, was within the territorial limits of this State. As a law imposing a special tax, it is to be strictly construed against the State and a case must be clearly made out for its application. We should incline against a construction which might lead to double taxation; a result possible and probable under a different view of this law. If the property in the foreign jurisdiction was in land, or in goods and chattels, when, upon the testator's death, a new title, or ownership, attached to it, the bringing into this State of its cash proceeds, subsequently, no matter by what authority of will, or of statute, did not subject it to the tax. A different view would be against every sound consideration of what constitutes the basis for such taxation, and would not accord with an understanding of the intention of the legislature, as more or less plainly expressed in these acts.

Another question, which I shall merely advert to in conclusion, arises upon a ruling of the surrogate with respect to appraisement, in connection with a clause of the will directing that the amount of the tax upon the legacies and devises should be paid as an expense of administration. The appraiser, in ascertaining the value of the residuary estate for the purpose of taxation, deducted the amount of the tax to be assessed on prior legacies. The surrogate overruled him in this, and held that there should be no deduction from the value of the resid-

uary estate of the amount of the tax to be assessed, either upon prior legacies, or upon its value. He held that the legacies taxable should be reported, irrespective of the provision of the will; and that a mode of payment of the succession tax prescribed by will is something with which the statute is not concerned. I am satisfied with his reasoning and can add nothing to its force. Manifestly, under the law that which is to be reported by the appraiser for the purpose of the tax is the value of the interest passing to the legatee under the will, without any deduction for any purpose, or under any testamentary direction.

A question is raised as to the effect upon the law, as contained in the acts of 1885 and 1887, of the passage of chapter 215 of the Laws of 1891; but as that has been the subject of another appeal, and is fully discussed in the opinion in the Matter of the Estate of Prime, 136 N. Y. 347, reference will be made to it here.

My brethren are of the opinion that the tax imposed under the act is a tax on the right of succession, under a will, or by devolution in case of intestacy; a view of the law which my consideration of the question precludes my assenting to.

They concur in my opinion so far as it relates to the imposition of a tax upon real estate situated out of this State, although owned by a decedent, residing here at the time of his decease; holding with me that taxation of such was not intended, and that the doctrine of equitable conversion is not applicable to subject it to taxation. But as to the personal property of a resident decedent, wheresoever situated, whether within or without the State, they are of the opinion that it is subject to the tax imposed by the act.

The judgment below, therefore, should be so modified as to exclude from its operation the personal property in New Jersey, and, as so modified, it should be affirmed, without costs to either party as against the other.

MATTER OF COOLEY.

COURT OF APPEALS, NEW YORK. 1906.

[Reported 186 N. Y. 220.]

HISCOCK, J. The appellants complain because in fixing the transfer tax upon certain shares of the capital stock of the Boston and Albany Railroad Company which belonged to the estate and passed under the will of the deceased who was a non-resident, said stock has been appraised at its full market value as representing an interest in the property of said corporation situate both in the State of New York and elsewhere. It is insisted by them that under the peculiar facts of this case the valuation placed for such purpose upon the stock should not have been predicated upon the idea that the latter represented an interest in all of the property of said corporation, but should have been fixed upon the theory that it represented an interest in only a portion of said property.

I think that their complaint is well founded and that the order appealed from should be reversed and the assessment corrected accordingly.

The Boston and Albany Railroad Company is a consolidation formed by the merger of one or more New York corporations and one Massachusetts corporation. The merger was authorized and the said consolidated corporation duly and separately created and organized under the laws of each state. It was, so to speak, incorporated in duplicate. There is but a single issue of capital stock representing all the property of the consolidated and dual organization. Of the track mileage about five-sixths is in Massachusetts and one-sixth in New York. The principal offices, including the stock transfer office, are situated in Boston, and there also are regularly held the meetings of its stockholders and directors. The deceased was a resident of the State of Connecticut, and owned four hundred and twenty-six shares of the capital stock, the value of which for the purposes of the transfer tax was fixed at the full market value of \$252.50 per share of the par value of \$100.

The provisions of the statute (L. 1896, ch. 908, § 220, as amd. L. 1897, ch. 284, § 2), authorizing the imposition of this tax are familiar, and read in part as follows:

“A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein . . . in the following cases: . . .

“2. When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death.”

The present assessment is under the last clause, and as already inti-

mated, the sole question, stated in practical form, is whether the authorities of this State ought to levy a tax upon the full value of decedent's holdings, recognizing simply the New York corporation and regarding it as the sole owner of all of the property of the doubly incorporated New York-Massachusetts corporation, or whether they should limit the tax to a portion of the total value, upon the theory that the company holds its property in Massachusetts at least under its incorporation in that State.

By seeking the aid of our laws and becoming incorporated under them, the consolidated Boston and Albany Railroad Company became a domestic corporation. (Matter of Sage, 70 N. Y. 220.)

The decedent, therefore, as the owner of Boston and Albany stock, may be regarded as holding stock in a domestic corporation, and it is so clearly settled that we need only state the proposition that capital stock in a domestic corporation, although held by a non-resident, will be regarded as having its *situs* where the corporation is organized, and is, therefore, taxable in this State. (Matter of Bronson, 150 N. Y. 1.)

There is, therefore, no question but that the decedent, holding stock in the Boston and Albany road, which was incorporated under the laws of this State, left "property within the State" which is taxable here. There is no doubt about the meaning of "property within the State," as applied to this situation, or that it justifies a taxation by our authorities of decedent's interest as a shareholder in the corporation created under the laws of this State. The only doubt is as to the extent and value of that interest for the purposes of this proceeding. For, although the tax is upon the transfer and not upon the property itself, still its amount is necessarily measured by the value of the property transferred, and, therefore, we come to consider briefly the nature of the stock here assessed as property and the theory upon which its value should be computed.

The general nature of a shareholder's interest in the capital stock of a corporation is easily understood and defined. In *Plympton v. Bigelow* (93 N. Y. 592) it is said that "The right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts."

In *Jermain v. L. S. & M. S. Ry. Co.* (91 N. Y. 483, 491) it was said: "A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation."

Therefore, since the shares of capital stock under discussion represented a certain interest in the surplus of assets over liabilities of the Boston and Albany Railroad Company, the value of that stock is to be decided by reference to the amount of property which said railroad company as incorporated in this State is to be regarded as owning for the purposes of this proceeding.

In the majority of cases at least a corporation has but a single corporate creation and existence under the laws of one State, and by virtue of such single existence owns all of its corporate property. There is no difficulty in determining in such a case that a shareholder under such an incorporation has an interest in all of the corporate property wherever and in how many different States situated. I shall have occasion to refer to that principle hereafter in another connection. Even in the case of a corporation incorporated and having a separate existence under the laws of more than one State, the stockholder would for some purposes be regarded as having an interest in all the corporate property independent of the different incorporations. In the present case the decedent, by virtue of his stock as between him and the corporation, would be regarded as having an interest in all of its property and entitled to the earnings thereon when distributed as dividends and to his share of the surplus upon dissolution and liquidation proceedings independent of the fact that there were two separate incorporations.

But, as it seems to me, different considerations and principles apply to this proceeding now before us for review. Our jurisdiction to assess decedent's stock is based solely and exclusively upon the theory that it is held in the Boston and Albany Railroad Company as a New York corporation. The authorities are asserting jurisdiction of and assessing his stock only because it is held in the New York corporation of the Boston and Albany Railroad Company. But we know that said company is also incorporated as a Massachusetts corporation, and presumably by virtue of such latter incorporation it has the same powers of owning and managing corporate property which it possesses as a New York corporation. In fact the location of physical property and the exercise of various corporate functions give greater importance to the Massachusetts than to the New York corporation, and the problem is whether for the purpose of levying a tax upon decedent's stock upon the theory that it is held in and under the New York corporation we ought to say that such latter corporation owns and holds all of the property of the consolidated corporation wherever situated, thus entirely ignoring the existence of and the ownership of property by the Massachusetts corporation. It needs no particular illumination to demonstrate that if we take such a view it will clearly pave the way to a corresponding view by the authorities and courts of Massachusetts that the corporation in that State owns all of the corporate property wherever situated, and we shall then further and directly be led to the unreasonable and illogical result that one set of property is at the same time solely and exclusively owned by two different corporations, and that a person holding stock should be assessed upon the full value of his stock in each jurisdiction. Whether we regard such a tax as is here being imposed, a recompense to the State for protection afforded during the life of the decedent or as a condition imposed for creating

and allowing certain rights of transfer or of succession to property upon death, we shall have each State exacting full compensation upon one succession and a clear case of double taxation. And if the corporation had been compelled for sufficient reasons to take out incorporation in six or twenty other States each one of them might take the same view and insist upon the same exaction until the value of the property was in whole or large proportion exhausted in paying for the privilege of succession to it. While undoubtedly the legislative authority is potent enough to prescribe and enforce double taxation, it is plain that, measured by ordinary principles of justice, the result suggested would be inequitable and might be seriously burdensome.

Double taxation is one which the courts should avoid whenever it is possible within reason to do so. (Matter of James, 144 N. Y. 6, 11.)

It is never to be presumed. Sometimes tax laws have that effect, but if they do it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition. (Tennessee v. Whitworth, 117 U. S. 129.)

The law of taxation is to be construed strictly against the State in favor of the taxpayer, as represented by the executor of the estate. (Matter of Fayerweather, 143 N. Y. 114.)

It seems pretty clear that within the principles of the foregoing and many other cases which might be cited, we ought not to sanction a course which will lead to a tax, measured by the full value of the decedent's stock in each State upon the conflicting theories that the corporation in that State owns all of the property of the consolidated company, unless there is something in the statute, or decisions under the statute, which compels us so to do. I do not think there is in either place such compelling authority.

No doubt is involved, as it seems to me, about the meaning and application of the statute. The decedent's stock was "property within the State," which had its *situs* here as being held in the New York corporation, and the transfer of it was taxable here. There can be no dispute about that. The question is simply over the extent and value of his interest as such stockholder, in view of the other incorporation in Massachusetts. I see nothing in the statute which prevents us from paying decent regard to the principles of interstate comity, and from adopting a policy which will enable each State fairly to enforce its own laws without oppression to the subject. This result will be attained by regarding the New York corporation as owning the property situate in New York and the Massachusetts corporation as owning that situate in Massachusetts, and each as owning a share of any property situate outside of either State or moving to and fro between the two States, and assessing decedent's stock upon that theory. That is the obvious basis for a valuation if we are to leave any room for the Massachusetts corporation and for a taxation by that State similar in principle to our own without double taxation.

Some illustrations may be referred to which by analogy sustain the general principles involved.

Where a tax is levied in this State upon the capital or franchises of a corporation organized as this railroad was, the tax is levied upon an equitable basis. Thus by the provisions of section 6 of chapter 19 of the Laws of 1869, under which the Boston and Albany railroad was organized, the assessment and taxation of its capital stock in this State is to be in the proportion "that the number of miles of its railroad situated in this State bears to the number of miles of its railroad situated in the other State," and under section 182 of the General Tax Law of the State of New York the franchise tax of a corporation is based upon the amount of capital within the State.

Again, assume that for purposes of dissolution or otherwise, receivers were to be appointed of the Boston and Albany railroad, there can be no doubt that the receivers of it as a New York corporation would be appointed by the courts of that State, and the receivers of it as a Massachusetts corporation would be appointed by the courts of that State, and that the courts would hold that in the discharge of their duties the New York receivers should take possession of and administer upon the property of the New York corporation within the limits of that State, and would not permit the Massachusetts receivers to come within its confines and interfere with such ownership, and the Massachusetts courts would follow a similar policy. Why should not the State authorities for purposes of this species of taxation and valuation, involved therein, adopt a similar theory of division of property?

We are not apprehensive lest, as suggested, New York corporations may take out incorporation in other States for the purpose of exempting transfers of their capital stock from taxation under the principles of this decision. We do not regard our decision as giving encouragement to any such course. It is based upon and limited by the facts as they are here presented, and there is no question whatever but that the Boston and Albany railroad, in good faith and for legitimate reasons, was equally and contemporaneously created both as a New York and a Massachusetts corporation. It can no more be said that being originally and properly a New York corporation it subsequently and incidentally became a Massachusetts one than could be maintained the reverse of such proposition. If in the future a corporation created and organized under the laws of this State, or properly and really to be regarded as a New York corporation, shall see fit either for the purpose suggested, or for any other reason subsequently and incidentally, and for ancillary reasons, to take out incorporation in another State, a case would arise not falling within this decision.

But it is said that this court has already made decisions which prevent it from adopting such a construction as I have outlined, and reference is made to Matter of Bronson (150 N. Y. 1) and Matter of Palmer (188 N. Y. 238).

I do not find anything in those decisions which, interpreted as a whole, with reference to the facts there being discussed, conflicts with the views which I have advanced.

In the first case the question arose whether a tax might be imposed upon a transfer of a non-resident decedent's residuary estate which "consisted in shares of the capital stock and in the bonds of corporations incorporated under the laws of this State." So far as the discussion relates to the question of taxing the bonds, it is immaterial. It was held that the shares of capital stock were property which was taxable, it being said: "The shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. The corporation has the legal title to all the properties acquired and appurtenant, but it holds them for the pecuniary benefit of those persons who hold the capital stock. . . . Each share represents a distinct interest in the whole of the corporate property." In other words, Judge GRAY, in writing the majority opinion, was discussing the situation of a shareholder in a domestic corporation which, so far as appears, was not incorporated under the laws of another State. Under such circumstances, of course, the New York corporation would be the owner of all the property there was, and the shareholder's interest in such corporation would represent his interest in all of said property and be fairly and justly taxable upon its full amount and value. No such situation was presented as here arises. There was no second or third corporation under the laws of another State, which corporation might just as fairly be said to be the owner of all the property as the New York corporation, thus raising the question here presented whether each corporation should be regarded as owning and holding all of the property there was for the purpose of laying the basis for taxation, or whether we should adopt an equitable and reasonable view, giving credit to each corporation for the purpose of taxation of owning some certain portion of the entire property.

In the Palmer case again the question arose over taxing shares of stock held by a non-resident decedent in a domestic corporation which was not proved or considered to have been incorporated under the laws of another State. It was insisted that the amount of the tax should be reduced by the proportion of property owned by the corporation and located in other States, and this contention was overruled, and, as it seems to me, for a perfectly good reason upon the facts in that case and which is not applicable to the facts here. As stated, there was a single incorporation under the laws of this State, and that domestic corporation owned all of the property in whatever State situated. Its corporate origin was under the laws of this State, and there its corporate existence was centred. It just as fully and completely owned and managed property situated in the State of Ohio as if it was situated in the State of New York, and if the property in the foreign

State was reduced to money, such money would be turned into its treasury in the State of New York. Under such circumstances there was nothing else that could reasonably be held than that the corporation owned all property wherever situated, and that the shareholder's interest in such corporation represented and was based upon such ownership of all the property. There was no double incorporation and no chance for conflict between an incorporation under the laws of this State and a second one existing under the laws of another State, which must either be reconciled by a just regard for the rights of both States and the rights of the incorporation under each, or else double taxation imposed upon a shareholder.

It is also argued that the courts of Massachusetts have passed upon the very contention here being made by appellants, and in the case of *Moody v. Shaw* (178 Mass. 375) have rejected the claim that the valuation of stock in this same corporation for the purposes of transfer taxation in Massachusetts should be based upon any apportionment of property between the Massachusetts and New York corporations. The opinion in that case does not seem to warrant any such construction. Apparently the only question under discussion was whether the transfer of stock in such corporation was taxable at all in Massachusetts, and the question of any apportionment was not passed upon. Such expressions as are found in the opinion touching that point certainly do not indicate to my mind that if involved and passed upon it would have been decided adversely to the views here expressed.

Lastly, it is urged that there will be great practical difficulty in making an apportionment of property for the purposes of valuation and taxation upon the lines suggested, and the learned counsel for the respondent has suggested many difficulties and absurdities claimed to be incidental to such course of procedure. Most of them certainly will not arise in this case and they probably never will in any other. Of course an appraisal based upon an apportionment of the entire property of the consolidated company between the New York and Massachusetts corporations may be made a source of much labor and expense if the parties so desire. Possibly it might be carried to the extent of a detailed inventory and valuation of innumerable pieces of property. Upon the other hand, an apportionment based upon trackage or figures drawn from the books or balance sheets of the company may doubtless be easily reached which will be substantially correct, and any inaccuracies of which when reflected in a tax of one per cent upon 426 shares of stock will be inconsequential.

The order of the Appellate Division and of the Surrogate's Court of the county of New York should be reversed, with costs, and the proceedings remitted to said Surrogate's Court for a reappraisal of the stock in question in accordance with the views herein expressed.

CULLEN, Ch. J., GRAY, O'BRIEN, and EDWARD T. BARTLETT, JJ., concur; WERNER and CHASE, JJ., dissent.

Order reversed, etc.

CHAPTER III.

JURISDICTION OF COURTS.

SECTION I.

JURISDICTION IN REM.

THE BELGENLAND.

SUPREME COURT OF THE UNITED STATES. 1885.

[*Reported 114 United States, 355.*]

BRADLEY, J.¹ This case grew out of a collision which took place on the high seas between the Norwegian barque "Luna" and the Belgian steamship "Belgenland," by which the former was run down and sunk. Part of the crew of the "Luna," including the master, were rescued by the "Belgenland" and brought to Philadelphia. The master immediately libelled the steamship on behalf of the owners of the "Luna" and her cargo, and her surviving crew, in a cause civil and maritime. . . . The District Court decided in favor of the libellant, and rendered a decree for the various parties interested to the aggregate amount of \$50,278.23. An appeal was taken to the Circuit Court. . . .

A decree was thereupon entered, affirming the decree of the District Court. . . . A reargument was had on the question of jurisdiction, and the court held and decided that the Admiralty Courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners of different nationalities; and overruled the plea to the jurisdiction. 9 Fed. Rep. 576. The case was brought before this court on appeal from the decree of the Circuit Court. See also 108 U. S. 153.

The first question to be considered is that of the jurisdiction of the District Court to hear and determine the cause.

It is unnecessary here, and would be out of place, to examine the question which has so often engaged the attention of the common law courts, whether, and in what cases, the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country. It is very fully dis-

¹ Only so much of the opinion as discusses the question of jurisdiction is given.
— ED.

cussed in *Mostyn v. Fabrigas*, Cowp. 161, and the notes thereto in 1 Smith's Leading Cases, 340; and an instructive analysis of the law will be found in the elaborate arguments of counsel in the case of the San Francisco Vigilant Committee, *Malony v. Dows*, 8 Abbott Pr. 316, argued before Judge Daly in New York, 1859. We shall content ourselves with inquiring what rule is followed by Courts of Admiralty in dealing with maritime causes arising between foreigners and others on the high seas.

This question is not a new one in these courts. Sir William Scott had occasion to pass upon it in 1799. An American ship was taken by the French on a voyage from Philadelphia to London, and afterwards rescued by her crew, carried to England, and libelled for salvage; and the court entertained jurisdiction. The crew, however, though engaged in the American ship, were British born subjects, and weight was given to this circumstance in the disposition of the case. The judge, however, made the following remarks: "But it is asked, if they were American seamen would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the meantime, I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. For salvage is a question of *jus gentium*, and materially different from the question of a mariner's contract, which is a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases, and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined." *The Two Friends*, 1 Ch. Rob. 271, 278.

The law has become settled very much in accord with these views. That was a case of salvage; but the same principles would seem to apply to the case of destroying or injuring a ship, as to that of saving it. Both, when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are *prima facie* proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious, or injured, parties.

The same question of jurisdiction arose in another salvage case which came before this court in 1804, *Mason v. The Blaireau*, 2 Cranch, 240. There a French ship was saved by a British ship, and brought into a port of the United States; and the question of jurisdiction was raised by Mr. Martin, of Maryland, who, however, did not press the

point, and referred to the observations of Sir William Scott in *The Two Friends*. Chief Justice Marshall, speaking for the court, disposed of the question as follows: "A doubt has been suggested," said he, "respecting the jurisdiction of the court, and upon a reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it." In that case, the objection had not been taken in the first instance, as it was in the present. But we do not see how that circumstance can affect the jurisdiction of the court, however much it may influence its discretion in taking jurisdiction.

For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. This branch of the subject will be found discussed in the following cases: *The Catherina*, 1 Pet. Adm. 104; *The Försöket*, 1 Pet. Adm. 197; *The St. Oloff*, 2 Pet. Adm. 428; *The Golubchick*, 1 W. Rob. 143; *The Nina*, L. R. 2 Adm. and Eccl. 44; s. c. on appeal, L. R. 2 Priv. Co. 38; *The Leon XIII.*, 8 Prob. Div. 121; *The Havana*, 1 Sprague, 402; *The Becherdass Ambaidass*, 1 Lowell, 569; *The Pawashick*, 2 Lowell, 142.

Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. *The Elwin Kreplin*, 9 Blatchford, 438, reversing s. c. 4 Ben. 413; see s. c. on application for mandamus, *Ex parte Newman*, 14 Wall. 152. Many public engagements of this kind have been entered into between our government and foreign States. See *Treaties and Conventions*, Rev. ed., 1873, Index, 1238.

In the absence of such treaty stipulations, however, the case of for-

eign seamen is undoubtedly a special one, when they sue for wages under a contract which is generally strict in its character, and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the ship-owners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill-treatment. On general principles of comity, Admiralty Courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction.

Not alone, however, in cases of complaints made by foreign seamen, but in other cases also, where the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow subjects, as to matters of contract or tort solely affecting themselves and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not. A salvage case of this kind came before the United States District Court of New York in 1848. The master and crew of a British ship found another British ship near the English coast apparently abandoned (though another vessel was in sight), and took off a portion of her cargo, brought it to New York, and libelled it for salvage. The British consul and some owners of the cargo intervened and protested against the jurisdiction, and Judge Betts discharged the case, delivered the property to the owners upon security given, and left the salvors to pursue their remedy in the English courts. One Hundred and Ninety-four Shawls, 1 Abbott Adm. 317.

So in a question of ownership of a foreign vessel, agitated between the subjects of the nation to which the vessel belonged, the English Admiralty, upon objection being made to its jurisdiction, refused to interfere, the consul of such foreign nation having declined to give his consent to the proceedings. The Agincourt, 2 Prob. Div. 239. But, in another case, where there had been an adjudication of the ownership under a mortgage in the foreign country, and the consul of that country requested the English court to take jurisdiction of the case upon a libel filed by the mortgagee, whom the owners had dispossessed, the court took jurisdiction accordingly. The Evangelistria, 2 Prob. Div. 241, note.

But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it. See 2 Parsons Ship. and Adm. 226, and cases

cited in notes. In the case of *The Jerusalem*, 2 Gall. 191, decided by Mr. Justice Story, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was intended that the vessel should come to the United States. In this case Justice Story examined the subject very fully, and came to the conclusion that, wherever there is a maritime lien on the ship, an Admiralty Court can take jurisdiction on the principle of the civil law, that in proceedings *in rem* the proper forum is the *locus rei sitæ*. He added: "With reference, therefore, to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy." That, as we have seen, was a case of bottomry, and Justice Story, in answer to the objection that the contract might have been entered into in reference to the foreign law, after showing that such law might be proven here, said: "In respect to maritime contracts, there is still less reason to decline the jurisdiction, for in almost all civilized countries these are in general substantially governed by the same rules."

Justice Story's decision in this case was referred to by Dr. Lushington with strong approbation in the case of *The Golubchick*, 1 W. Rob. 143, decided in 1840, and was adopted as authority for his taking jurisdiction in that case.

In 1839, a case of collision on the high seas between two foreign ships of different countries (the very case now under consideration) came before the English Admiralty. The *Johann Friederich*, 1 W. Rob. 35. A Danish ship was sunk by a Bremen ship, and on the latter being libelled, the respondents entered a protest against the jurisdiction of the court. But jurisdiction was retained by Dr. Lushington, who, amongst other things, remarked: "An alien friend is entitled to sue [in our courts] on the same footing as a British born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatus*, no objection could have been taken." Reference being made to the observations of Lord Stowell in cases of seamen's wages, the judge said: "All questions of collision are questions *communis juris*; but in case of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not. . . . If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return, and, if she did, there is no part of the world to which they might not be sent for their redress."

In the subsequent case of *The Griefswald*, 1 Swabey, 430, decided by the same judge in 1859, which arose out of a collision between a

British barque and a Persian ship in the Dardanelles, Dr. Lushington said: "In cases of collision, it has been the practice of this country, and, so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable."

The subject has frequently been before our own Admiralty Courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it. It was exercised in two cases of collision coming before Mr. Justice Blatchford, while district judge of the Southern District of New York, *The Jupiter*, 1 Ben. 536, and *The Steamship Russia*, 3 Ben. 471. In the former case the law was taken very much for granted; in the latter it was tersely and accurately expounded, with a reference to the principal authorities. Other cases might be referred to, but it is unnecessary to cite them. The general doctrine on the subject is recognized in the case of *The Maggie Hammond*, 9 Wall. 435, 457, and is accurately stated by Chief Justice Taney in his dissenting opinion in *Taylor v. Carryl*, 20 How. 583, 611.

As the assumption of jurisdiction in such cases depends so largely on the discretion of the court of first instance, it is necessary to inquire how far an appellate court should undertake to review its action. We are not without authority of a very high character on this point. In a quite recent case in England, that of *The Leon XIII.*, 8 Prob. Div. 121, the subject was discussed in the Court of Appeal. That was the case of a Spanish vessel libelled for the wages of certain British seamen who had shipped on board of her, and the Spanish consul at Liverpool protested against the jurisdiction of the Admiralty Court on the ground that the shipping articles were a Spanish contract, to be governed by Spanish law, and any controversy arising thereon could only be settled before a Spanish court, or consul. Sir Robert Phillimore held that the seamen were to be regarded for that case as Spanish subjects, and, under the circumstances, he considered the protest a proper one and dismissed the suit. The Court of Appeal held that the judge below was right in regarding the libellants as Spanish subjects; and on the question of reviewing his exercise of discretion in refusing to take jurisdiction of the case, Brett, M. R., said: "It is then said that the learned judge has exercised his discretion wrongly. What then is the rule as regards this point in the Court of Appeal? The plaintiffs must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the Court of Appeal holds, that they are justified in saying he has exercised it wrongly. I cannot see that any wrong principle has been acted on by the learned judge, or anything done in the exercise of his discretion so unjust or unfair as to entitle us to overrule his discretion."

This seems to us to be a very sound view of the subject; and acting on this principle, we certainly see nothing in the course taken by the District Court in assuming jurisdiction of the present case, which calls for animadversion. Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to which the litigants belong. As Judge Deady very justly said, in a case before him in the district of Oregon: "The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found." *Bernhard v. Greene*, 3 Sawyer, 230, 235.

ARNDT v. GRIGGS.

SUPREME COURT OF THE UNITED STATES. 1890.

[Reported 134 *United States*, 316.]

BREWER, J. The statutes of Nebraska contain these sections: Sec. 57, chap. 73, Compiled Statutes 1885, p. 483: "An action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." Sec. 58: "All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought, as may be necessary to fully settle or determine the question of title between the parties to said real estate, and to decree the title to the same, or any part thereof, to the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment, or order into effect." Sec. 77, Code of Civil Procedure, Compiled Statutes 1885, p. 637: "Service may be made by publication in either of the following cases: "Fourth. In actions which relate to, or the subject of which is, real or personal property in this State, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the State or a foreign corporation." Sec. 78 of the Code: "Before service can be made by publication,

See 99 S. E. 92
(M. Va.)
Also Found
Eq. Jan 1920 H.R.

an affidavit must be filed that service of a summons cannot be made within this State, on the defendant or defendants, to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication." Sec. 82 of the Code: "A party against whom a judgment or decree has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; . . . but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title to any property sold before judgment under an attachment." Sec. 429 b, of the Code: "When any judgment or decree shall be rendered for a conveyance, release, or acquittance, in any court of this State, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformable to such judgment or decree."

Under these sections, in March, 1882, Charles L. Flint filed his petition in the proper court against Michael Hurley and another, alleging that he was the owner and in possession of the tracts of land in controversy in this suit; that he held title thereto by virtue of certain tax deeds, which were described; that the defendants claimed to have some title, estate, interest in, or claim upon the lands by patent from the United States, or deed from the patentee, but that whatever title, estate, or claim they had, or pretended to have, was divested by the said tax deeds, and was unjust, inequitable, and a cloud upon plaintiff's title; and that this suit was brought for the purpose of quieting his title. The defendants were brought in by publication, a decree was entered in favor of Flint quieting his title, and it is conceded that all the proceedings were in full conformity with the statutory provisions above quoted.

The present suit is one in ejectment, between grantees of the respective parties to the foregoing proceedings to quiet title; and the question before us, arising upon a certificate of division of opinion between the trial judges, is whether the decree in such proceedings to quiet title, rendered in accordance with the provisions of the Nebraska statute, upon service duly authorized by them, was valid and operated to quiet the title in the plaintiff therein. In other words, has a State the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court only by publication? The Supreme Court of Nebraska has answered this question in the affirmative. *Watson v. Ulbrich*, 18 Neb. 189 — in which the court says: "The principal question to be determined is whether or not the decree in

favor of Gray, rendered upon constructive service, is valid until set aside. No objection is made to the service, or any proceedings connected with it. The real estate in controversy was within the jurisdiction of the District Court, and that court had authority, in a proper case, to render the decree confirming the title of Gray. In *Castrique v. Imrie*, L. R. 4 H. L. 414, 429, Mr. Justice Blackburn says: 'We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.' The court, therefore, in this case, having authority to render the decree, and jurisdiction of the subject-matter, its decree is conclusive upon the property until vacated under the statutes or set aside."

Section 57, enlarging as it does the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property, has been sustained by this court, and held applicable to suits in the Federal court. *Holland v. Challen*, 110 U. S. 15. But it is earnestly contended that no decree in such a case, rendered on service by publication only, is valid or can be recognized in the Federal courts. And *Hart v. Sansom*, 110 U. S. 151, is relied on as authority for this proposition. The propositions are, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone.

While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the

purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the Federal courts. In *United States v. Fox*, 94 U. S. 315, 320, it was said: "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." See also *McCormick v. Sullivan*, 10 Wheat. 192, 202; *Beauregard v. New Orleans*, 18 How. 497; *Suydam v. Williamson*, 24 How. 427; *Christian Union v. Yount*, 101 U. S. 352; *Lathrop v. Bank*, 8 Dana, 114.

Passing to an examination of the decisions on the precise question it may safely be affirmed that the general, if not the uniform, ruling of State courts has been in favor of the power of the State to thus quiet the title to real estate within its limits. In addition to the case from Nebraska, heretofore cited, and which only followed prior rulings in that State, — *Scudder v. Sargent*, 15 Neb. 102; *Keene v. Sallenbach*, 15 Neb. 200 — reference may be had to a few cases. In *Cloyd v. Trotter*, 118 Ill. 391, the Supreme Court of Illinois held that under the statutes of that State the court could acquire jurisdiction to quiet title by constructive service against non-resident defendants. A similar ruling as to jurisdiction acquired in a suit to set aside a conveyance as fraudulent as to creditors was affirmed in *Adams v. Cowles*, 95 Mo. 501. In *Wunstel v. Landry*, 39 La. Ann. 312, it was held that a non-resident party could be brought into an action of partition by constructive service. In *Essig v. Lower*, 21 Northeastern Rep. 1090, the Supreme Court of Indiana thus expressed its views on the question: "It is also argued that the decree in the action to quiet title, set forth in the special finding, is *in personam* and not *in rem*, and that the court had no power to render such decree on publication. While it may be true that such decree is not *in rem*, strictly speaking, yet it must be conceded that it fixed and settled the title to the land then in controversy, and to that extent partakes of the nature of a judgment *in rem*. But we do not deem it necessary to a decision of this case

to determine whether the decree is *in personam* or *in rem*. The action was to quiet the title to the land then involved, and to remove therefrom certain apparent liens. Section 318, Rev. Stat. 1881, expressly authorizes the rendition of such a decree on publication." This was since the decision in *Hart v. Sansom*, as was also the case of *Dillen v. Heller*, 39 Kansas, 599, in which Mr. Justice Valentine, for the court, says: "For the present we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the only question to be considered is whether the statutes themselves are valid. Or, in other words, we think the question is this: Has the State any power, through the legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the State belonging to non-resident owners out of the State, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the State or to the courts of the State, and where the most urgent public policy and justice require that the State and its courts should assume jurisdiction over such property? Power of this kind has already been exercised, not only in Kansas, but in all the other States. Lands of non-resident owners, as well as of resident owners, are taxed and sold for taxes; and the owners thereby may totally be deprived of such lands, although no notice is ever given to such owners, except a notice by publication, or some other notice of no greater value, force, or efficacy. *Beebe v. Doster*, 36 Kansas, 666, 675, 677; s. c. 14 Pac. Rep. 150. Mortgage liens, mechanics' liens, material-men's liens, and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication. *Gillespie v. Thomas*, 23 Kansas, 138; *Walkenhorst v. Lewis*, 24 Kansas, 420; *Rowe v. Palmer*, 29 Kansas, 337; *Venable v. Dutch*, 37 Kansas, 515, 519. All the States by proper statutes authorize actions against non-residents, and service of summons therein by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are non-residents. We think a sovereign State has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and, generally, within its own boundaries a sovereignty is supreme. Kansas is supreme, except so far as its power and authority are limited by the Constitution and laws of the United States; and within the Constitution and laws of the United States the courts of Kansas may have all the jurisdiction over all persons and things within the State which the constitution and laws of Kansas may give to them; and the mode of obtaining this jurisdiction may be prescribed wholly,

entirely, and exclusively by the statutes of Kansas. To obtain jurisdiction of everything within the State of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service."

Turning now to the decisions of this court: In *Boswell's Lessee v. Otis*, 9 How. 336, 348, was presented a case of a bill for a specific performance and an accounting, and in which was a decree for specific performance and accounting; and an adjudication that the amount due on such accounting should operate as a judgment at law. Service was had by publication, the defendants being non-residents. The validity of a sale under such judgment was in question; the court held that portion of the decree, and the sale made under it, void; but with reference to jurisdiction in a case for specific performance alone, made these observations: "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service or process, it is substantially of that character."

In the case of *Parker v. Overman*, 18 How. 137, 140, the question was presented under an Arkansas statute, a statute authorizing service by publication. While the decision on the merits was adverse, the court thus states the statute, the case and the law applicable to the proceedings under it: "It had its origin in the State court of Dallas County, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object is to quiet the title. The purchaser at such sales is authorized to institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold, and 'calling on all persons who can set up any right to the lands so purchased, in consequence of any informality, or any irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed.' In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But if opposition be made, and it should appear that the sale was made 'contrary to law,' it became the duty of the court to annul it. The judgment or decree, in favor of the grantee in the deed, operates 'as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings.' It is a very great evil in any community to have titles to land insecure and uncertain; and especially in new States, where its result is to retard the settlement and improve-

ment of their vacant lands. Where such lands have been sold for taxes there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a lawsuit, or risk the loss of his money and labor upon a litigious title. The act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property; and, like a proceeding *in rem*, it becomes conclusive against the absent claimant, as well as the present contestant. As was said by the court in *Clark v. Smith*, 13 Pet. 195, 203, with regard to a similar law of Kentucky: 'A State has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and, having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The State legislatures have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the State court.' In the case before us the proceeding, though special in its form, is in its nature but the application of a well known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another State."

In the case of *Pennoyer v. Neff*, 95 U. S. 714, 727, 734, in which the question of jurisdiction in cases of service by publication was considered at length, the court, by Mr. Justice Field, thus stated the law: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. . . . It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned." These cases were all before the decision of *Hart v. Sansom*.

Passing to a case later than that, *Huling v. Kaw Valley Railway*,

130 U. S. 559, 563, it was held that, in proceedings commenced under a statute for the condemnation of lands for railroad purposes, publication was sufficient notice to a non-resident. In the opinion, Mr. Justice Miller, speaking for the court, says: "Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interests, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters. The owner of real estate, who is a non-resident of the State within which the property lies, cannot evade the duties and obligations, which the law imposes upon him in regard to such property, by his absence from the State. Because he cannot be reached by some process of the courts of the State, which, of course, have no efficacy beyond their own borders, he cannot, therefore, hold his property exempt from the liabilities, duties, and obligations which the State has a right to impose upon such property; and in such cases, some substituted form of notice has always been held to be a sufficient warning to the owner, of the proceedings which are being taken under the authority of the State to subject his property to those demands and obligations. Otherwise the burdens of taxation and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every State of the Union." In this connection, it is well to bear in mind, that by the statutes of the United States, in proceedings to enforce any legal or equitable lien, or to remove a cloud upon the title of real estate, non-resident holders of real estate may be brought in by publication, 18 Stat. 472; and the validity of this statute, and the jurisdiction conferred by publication, has been sustained by this court. *Mellen v. Moline Iron Works*, 131 U. S. 352.

These various decisions of this court establish that, in its judgment, a State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication; and that is all that is necessary to sustain the validity of the decree in question in this case.

Nothing inconsistent with this doctrine was decided in *Hart v. Sansom*, *supra*. The question there was as to the effect of a judgment. That judgment was rendered upon a petition in ejectment against one Wilkerson. Besides the allegations in the petition to sustain the ejectment against Wilkerson, were allegations that other defendants named had executed deeds, which were described, which were clouds upon plaintiffs' title; and in addition an allegation that the defendant Hart set up some pretended claim of title to the land. This was the only averment connecting him with the controversy. Publication was made

against some of the defendants, Hart being among the number. There was no appearance, but judgment upon default. That judgment was, that the plaintiffs recover of the defendants the premises described; "that the several deeds in plaintiffs' petition mentioned be, and the same are, hereby annulled and cancelled, and for naught held, and that the cloud be thereby removed;" and for costs, and that execution issue therefor. This was the whole extent of the judgment and decree. Obviously in all this there was no adjudication affecting Hart. As there was no allegation that he was in possession, the judgment for possession did not disturb him; and the decree for cancellation of the deeds referred specifically to the deeds mentioned in the petition, and there was no allegation in the petition that Hart had anything to do with those deeds. There was no general language in the decree quieting the title as against all the defendants; so there was nothing which could be construed as working any adjudication against Hart as to his claim and title to the land. He might apparently be affected by the judgment for costs, but they had no effect upon the title. So the court held, for it said: "It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removes the cloud upon the plaintiffs' title appears to be limited to the cloud created by the deeds mentioned in the petition, and the petition does not allege, and the verdict negatives, that Hart held any deed."

An additional ground assigned for the decision was that if there was any judgment (except for costs) against Hart, it was, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and therefore, according to the ordinary and undisputed rule in equity, was not a judgment *in rem*, establishing against him a title in the land. But the power of the State, by appropriate legislation, to give a greater effect to such a decree was distinctly recognized, both by the insertion of the words "unless otherwise expressly provided by statute," and by adding: "It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." And of course it follows that if a State has power to bring in a non-resident by publication for the purpose of appointing a trustee, it can, in like manner, bring him in and subject him to a direct decree. There was presented no statute of the State of Texas providing directly for quieting the title of lands within the State, as against non-residents, brought in only by service by publication, such as we have in the case at bar, and the only statute cited by counsel or referred to in the opinion was a mere general provision for bringing in non-resident defendants in any case by publication; and it was not the intention of the court to overthrow that series of earlier authorities heretofore referred to, which affirm the

power of the State, by suitable statutory proceedings, to determine the titles to real estate within its limits, as against a non-resident defendant, notified only by publication.

It follows, from these considerations, that the first question presented in the certificate of division, the one heretofore stated, and which is decisive of this case, must be answered in the affirmative.

SECTION II.

PERSONAL JURISDICTION.

BUCHANAN *v.* RUCKER.

KING'S BENCH. 1808.

[*Reported 9 East, 192.*]

THE plaintiff declared in assumpsit for £2,000 on a foreign judgment of the Island Court in Tobago; and at the trial (*Vide* 1 Campbell's Ni. Pri. Cas. 63) before Lord Ellenborough, C. J., at Guildhall, produced a copy of the proceedings and judgment, certified under the handwriting of the Chief Justice and the seal of the island, which were proved; which, after containing an entry of the declaration, set out a summons to the defendant, therein described as "formerly of the city of Dunkirk, and now of the city of London, merchant," to appear at the ensuing court to answer the plaintiff's action; which summons was returned "served, etc., by nailing up a copy of the declaration at the court-house door," etc., on which judgment was afterwards given by default. Whereupon it was objected, that the judgment was obtained against the defendant, who never appeared to have been within the limits of the island, nor to have had any attorney there; nor to have been in any other way subject to the jurisdiction of

the court at the time; and was therefore a nullity. And of this opinion was Lord Ellenborough; though it was alleged (of which however there was no other than parol proof) that this mode of summoning absentees was warranted by a law of the island, and was commonly practised there; and the plaintiff was thereupon nonsuited. And now

Taddy moved to set aside the nonsuit, and for a new trial, on an affidavit verifying the island law upon this subject, which stated, "That every defendant against whom any action shall be entered, shall be served with a summons and an office copy of the declaration, with a copy of the account annexed, if any, at the same time, by the Provost Marshal, etc., six days before the sitting of the next court, etc.; and the Provost Marshal is required to serve the same on each defendant in person. But if such defendant cannot be found, and is not absent from the island; then it shall be deemed good service by leaving the summons, etc., at his most usual place of abode. And if the defendant be absent from the island, and hath a power of attorney recorded in the secretary's or registrar's office of Tobago, and the attorney be resident in the island, or any manager or overseer on his plantation in the island, the service shall be either upon such attorney personally, or by leaving it at his last place of abode, or upon such overseer or manager personally, or by leaving it at the house upon the defendant's plantation where the overseer or manager usually resides. But if no such attorney, overseer, or manager, then the nailing up a copy of the declaration and summons at the entrance of the court-house shall be held good service."

LORD ELLENBOROUGH, C. J. There is no foundation for this motion even upon the terms of the law disclosed in the affidavit. By persons absent from the island must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the court; but it can never be applied to a person who for aught appears never was present within or subject to the jurisdiction. Supposing, however, that the act had said in terms, that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the court door: how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? The law itself, however, fairly construed, does not warrant such an inference: for "absent from the island" must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the court out of which the process issued; and as nothing of that sort was in proof here to show that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit in law upon the judgment so obtained. *Per Curiam.* *Rule refused.*¹

¹ *Acc.* Wood v. Watkinson, 17 Conn. 500; Howell v. Gordon, 40 Ga. 302; Beard v. Beard, 21 Ind. 321; Rand v. Hanson, 154 Mass. 87; Cocke v. Brewer, 68 Miss.

DOUGLAS v. FORREST.

COURT OF COMMON PLEAS. 1828.

[*Reported 4 Bingham, 686.*]

BEST, C. J.¹ This was an action brought by the assignees of Stein and Co., bankrupts, against the executor of the will of John Hunter.

On the 31st May, 1799, the testator acknowledged himself to be indebted to Stein and Co. in the sum of £447 6s. 3d.; and on the 11th June, in the same year, he acknowledged that he owed £75 to Robert Smith, one of the bankrupts, and one of the firm of Stein and Co. These debts were contracted in Scotland, of which country the deceased was a native, and in which he had a heritable property. Shortly after the year 1799, the deceased went to India. He died in India in 1817, having never revisited Scotland.

On the 25th February, 1802, two decrees were pronounced in the Court of Session in Scotland against the deceased, one at the instance of Stein and Co., and the other at the instance of Robert Smith. In the first of these the deceased was ordered to pay to Stein and Co. £447 6s. 3d., with interest, from the day of besides expenses of process, etc. In the second decree the deceased was ordered to pay Robert Smith the sum of £75, with interest, from the of , besides expenses of process, etc. It appeared, from these decrees, that the deceased was out of Scotland at the time the proceedings were instituted in these causes. He never had any notice of those proceedings. The decrees stated, that the deceased had been (according to the law of Scotland) summoned at the market cross of Edinburgh, and at the pier and shore of Leith. A Scotch advocate proved, that, by the law of Scotland, the Court of Session might pronounce judgment against a native Scotchman who had heritable property in that country, for a debt contracted in Scotland, although the debtor had no notice of any of the proceedings, and was out of Scotland at the time. After such proclamations as were mentioned in these decrees had been made, the same witness proved, that a person against whom such a decree was pronounced might, at any time within forty years, dispute the merits of such decree; but that after the expiration of forty years, it was conclusive against him, and all who claimed under him.

By a decree of the Court of Session, of the date of the 5th July, 1804, that court adjudged that certain property which the deceased possessed in Scotland should belong to Robert Smith and his heirs, in payment and satisfaction of the sum of £75, with interest, from the 11th June, 1799. By another decree of the same date, the Court of Sessions

775, 9 So. 823; Whittier v. Wendell, 7 N. H. 257; Schwinger v. Hickok, 53 N. Y. 230; Price v. Schaeffer, 161 Pa. 530, 29 Atl. 279.—ED.

¹ Part of the opinion is omitted.—ED.

adjudged, that certain other property of the deceased in Scotland should belong to Stein and Co. and their heirs, in payment and satisfaction of the sum of £447 6s. 3d., with interest, from the 11th of June, 1799. The two last decrees fill up the blanks left in the first decrees, by giving the time from which interest was to be paid on the debts, namely, from the 11th June, 1799; and if the plaintiffs can maintain their action, entitles them to a verdict for the sum of £862. The terms in which the two last decrees are expressed, seem to import that the lands adjudged to Stein and Co. and Smith were given to and accepted by them, in satisfaction of these debts; but this cannot be the true construction of these decrees, because none of the decrees are conclusive against the deceased and those who claim under him, until the expiration of forty years from the time of pronouncing the two first decrees. The advocate who was examined in the cause proved, that by the law of Scotland, these decrees would not operate as satisfaction of the debts, during the period that the debtor had a right to dispute the validity of the first judgments. A Scotch statute, which we have looked into, shows the accuracy of the opinion given to us on the Scotch laws by the learned advocate; and I feel it due to him to say, that, from the manner in which he gave his evidence, the clearness and precision with which he explained the grounds of his opinion, I have no doubt that he is extremely well acquainted with the Scotch law, and that we may safely rely on every part of his evidence.

The two last decrees, proving that interest was to run from 1799, and the testimony of the learned advocate, who proved, that when decrees adjudged that interest should be paid, but did not show the time from which it was to run, interest was payable from the time of the citation,—disposes of the objection that no interest could be recovered upon these decrees.

The plaintiffs rested their claim on these decrees. The defendant insisted that these decrees would not support an action in our courts, because they were repugnant to the principles of justice, having been pronounced whilst the deceased was at a great distance from Scotland, and without any notice given to him that any proceedings were instituted against him. This defence was made on the general issue. The defendant also pleaded, that the plaintiff's cause of action did not accrue within six years before the commencement of the suit. To this there was a replication, that the deceased, at the time when the cause of action accrued, was beyond seas, and remained beyond the seas until the year 1817, when he died; and that the plaintiffs sued out their writ against the defendant within six years after he first took on himself the burthen and execution of the will of the deceased in Great Britain, and that he had no other executor in Great Britain. This replication was fully proved, and, therefore, the issue taken on it was properly found for the plaintiffs.

The questions to be decided are, first, whether an action can be maintained in England on these judgments of the Court of Session in

Scotland; secondly, whether the replication is an answer to the pleas of the statute of limitations.

On the first question we agree with the defendant's counsel, that if these decrees are repugnant to the principles of universal justice, this court ought not to give effect to them; but we think that these decrees are perfectly consistent with the principles of justice. If we held that they were not consistent with the principles of justice, we should condemn the proceedings of some of our own courts. If a debt be contracted within the city of London, and the creditor issues a summons against the debtor to which a return is made, that the debtor hath nothing within the city by which he may be summoned, or, in plainer words, hath nothing by the seizure of which his appearance may be enforced, goods belonging to the debtor in the hands of a third person, or money due from a third person to the debtor, may be attached; and unless the debtor appears within a year and a day, and disputes his debt, he is forever deprived of his property or the debts due to him.

In such cases the defendant may be in the East Indies whilst the proceedings are going on against him in a court in London, and may not know that any such proceedings are instituted. Instead of the forty years given by the Scotch law, he has only one year given to him to appear and prevent a decision that finally transfers from him his property. Lord Chief Justice De Grey thought this custom of foreign attachment was an unreasonable one, but it has existed from the earliest times in London, and in other towns in England, and in many of our colonies from their first establishment. Lord Chief Justice De Grey and the Court of Common Pleas, after much consideration, decided against the validity of the attachment, according to the report of *Fisher v. Lane* in 3 Wilson, 297, because the party objecting to it had never been summoned or had notice. The report of the same case in 2 Blackstone, 834, shows that the court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but a summons with a return of *nihil*; that is, such a summons as I have mentioned, namely, one that shows that the debtor is not within the city, and has nothing there, by the seizing of which he may be compelled to appear. The 54 G. III. c. 137 not only recognizes the practices on which these decrees are founded, as being according to the law of Scotland, but enacts, that on notices being given at the market cross at Edinburgh, and on the pier and shore of Leith, to debtors out of the kingdom, in default of their appearance the creditors may issue a sequestration against their effects. Can we say that a practice which the legislature of the United Kingdom has recognized and extended to other cases is contrary to the principles of justice?

A natural-born subject of any country, quitting that country, but leaving property under the protection of its law, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation.

The deceased, before he left his native country, acknowledged, under

his hand, that he owed the debts; he was under a moral obligation to discharge those debts as soon as he could. It must be taken for granted, from there being no plea of *plene administravit*, that the deceased had the means of paying what was due to the bankrupts. The law of Scotland has only enforced the performance of a moral obligation, by making his executor pay what he admitted was due, with interest during the time that he deprived his creditors of their just debts.

The reasoning of Lord Ellenborough, in the case of *Buchanan v. Rucker* (1 Campb. 63, and 9 East, 192), is in favor of these decrees. Speaking of a case decided by Lord Kenyon, his Lordship says, in that case the defendant had property in the island, and might be considered as virtually present. The court decided against the validity of the attachment, because it did not appear that the party attached ever was in the island, or had any property in it. In both these respects that case is unlike the present. In the case of *Cavan v. Stewart*, Lord Ellenborough says, you must prove him summoned, or, at least, that he was once in the island of Jamaica, when the attachment issued.

To be sure if attachments issued against persons who never were within the jurisdiction of the court issuing them could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it.

SCHIBSBY v. WESTENHOLZ.

QUEEN'S BENCH. 1870.

[*Reported Law Reports*, 6 *Queen's Bench*, 155.]

BLACKBURN, J. This was an action on a judgment of a French tribunal given against the defendants for default of appearance.

The pleas to the action were, amongst others, a plea of never indebted, and, thirdly, a special plea asserting that the defendants were not resident or domiciled in France, or in any way subject to the jurisdiction of the French court, nor did they appear; and that they were not summoned, nor had any notice or knowledge of the pending of the proceedings, or any opportunity of defending themselves therefrom. On these pleas issue was joined.

On the trial before me the evidence of a French *avocat* was given, by which it appeared that by the law of France a French subject may sue a foreigner, though not resident in France, and that for this purpose an alien, if resident in France, was considered by the French law as a French subject.¹ The mode of citation in such a case, according to the French law, is by serving the summons on the *Procureur Impérial*. If the foreign defendant thus cited does not within one month appear, judgment may be given against him, but he may still, at any time within two months after judgment, appear and be heard on the merits. After that lapse of time the judgment is final and conclusive. The practice of the imperial government is, in such a case, to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; but this, as was explained by the *avocat*, is not required by the French law, but is simply done by the imperial government voluntarily from a regard to fair dealing.

It appeared by other evidence that the plaintiff in this case was a Dane resident in France. The defendants were also Danes, resident in London and carrying on business there. A written contract had been made between the plaintiff and defendants, which was in English, and dated in London, but no distinct evidence was given as to where it was signed. We think, however, that, if that was material, the fair intendment from the evidence was that it was made in London. By this contract the defendants were to ship in Sweden a cargo of Swedish oats free on board a French or Swedish vessel for Caen, in France, at a certain rate for all oats delivered at Caen. Payment was to be made on receipt of the shipping documents, but subject to correction for excess or deficiency according to what might turn out to be the delivery at Caen. From the correspondence it appeared that the plaintiff asserted, and the defendants denied, that the delivery at Caen was short of the quantity for which the plaintiff had paid, and that the plaintiff made some other complaints as to the condition of the cargo, which were denied by the defendants. The plaintiff very plainly told the defendants that if they would not settle the claim he would sue them in the French courts. He did issue process in the manner described, and the French consulate in London served on the defendants a copy of the citation.

The following admissions were then made, namely: that the judgment was regular according to French law; that it was given in favor of the plaintiff, a foreigner domiciled in France, against the defendants,

¹ See Article 14 of the Code Civil: "L'étranger même non résidant en France pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un français; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des français."

Codes Annotés de Sirey: Code Civil, Art. 14, Note 42: "Un étranger qui a une maison de commerce établie et patente en France, peut, aussi bien qu'un français, assigner un autre étranger devant un tribunal français."

French subjects, and having no

enter into the question whether the
the merits, no fraud being alleged

have since changed) that, subject
entitled to the verdict, but reserved

its had notice and knowledge of the
proceedings in time to have appeared
each court. I then directed the ver-
dict to enter the verdict for the
finding.

as to the sufficiency of the pleas
had been, I should have made any
we are of opinion that none was

by Sir George Honyman, against
term and in the sittings after it be-
Hannen, and myself. During the
the rule and the showing cause, the
Q. B. 139, on which we have just
my Brothers Mellor, Hannen, and
occasion to consider the whole subject
foreign judgments.

party to the discussions in *Godard*
since the argument in the present
by the majority in *Godard v.*
after hearing the argument in the
that the rule should be made

in what we have already said in

there given, the true principle on
tribunals are enforced in England is
v. Smyth, 9 M. & W. 819, and
v. Jones, 13 M. & W. 633, that the
jurisdiction over the defendant im-
defendant to pay the sum for which
in this country are bound to en-
which negatives that duty, or
it, is a defence to the action.

argument with the fact that the British
Law Procedure Act, 1852 (15 & 16
on our courts a power of summon-
testament, to appear, and in case they
by default. It was this consid-

eration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed. And we think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down.

Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgment being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners.

Again, it was argued before us that foreign judgments obtained by default, where the citation was (as in the present case) by an artificial mode prescribed by the laws of the country in which the judgment was given, were not enforceable in this country because such a mode of citation was contrary to natural justice, and if this were so, doubtless the finding of the jury in the present case would remove that objection. But though it appears by the report of *Buchanan v. Rucker*, 1 Camp. 63, that Lord Ellenborough in the hurry of *Nisi Prius* at first used expressions to this effect, yet when the case came before him *in banco* in *Buchanan v. Rucker*, 9 East, 192, he entirely abandoned what (with all deference to so great an authority) we cannot regard as more than declamation, and rested his judgment on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction. "Can," he said, "the Island of Tobago pass a law to bind the rights of the whole world?"

The question we have now to answer is, Can the empire of France pass a law to bind the whole world? We admit, with perfect candor, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a court of the United States, the question for the court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No, but every country can pass laws to bind a great many persons; and therefore the further question has to be de-

terminated, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce.

① Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

③ If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of those suppositions is negatived in the present case.

④ Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.

In the case of *General Steam Navigation Company v. Guillou*, 11 M. & W. 877, 894, on a demurrer to a plea, Parke, B., in delivering the considered judgment of the Court of Exchequer, then consisting of Lord Abinger, C.B., Parke, Alderson, and Gurney, BB., thus expresses himself: "The substance of the plea is that the cause of action has been already adjudicated upon, in a competent court, against the plaintiffs, and that the decision is binding upon them, and that they ought not to be permitted again to litigate the same question. Such a plea ought to have had a proper commencement and conclusion. It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance; but it is not to be understood that we feel much doubt on that question. They do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance or temporary presence by the decision of a French court, and they did not select the tribunal and sue as plaintiffs, in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey."

It will be seen from this that those very learned judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment, merely by appearing to defend themselves against it. On the other hand, in *Simpson v. Fogo*, 1 John. & H. 18, 29 L. J. (Ch.) 657, 1 Hem. & M. 195, 32 L. J. (Ch.) 249, where the mortgagees of an English ship had come into the courts of

Louisiana, to endeavor to prevent the sale of their ship seized under an execution against the mortgagors, and the courts of Louisiana decided against them, the Vice-Chancellor and the very learned counsel who argued in the case seem all to have taken it for granted that the decision of the court in Louisiana would have bound the mortgagees had it not been in contemptuous disregard of English law. The case of *General Steam Navigation Company v. Guillou*, 11 M. & W. 877, was not referred to, and therefore cannot be considered as dissented from; but it seems clear that they did not agree in the latter part of the opinion there expressed.

We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Brissac v. Rathbone*, 6 H. & N. 301, 30 L. J. (Ex.) 238, is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favor he is bound.

In *Douglas v. Forrest*, 4 Bing. 703, the court, deciding in favor of the party suing on a Scotch judgment, say: "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." Those circumstances are all negatived here. We should, however, point out that, whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas v. Forrest*, we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France. As to this, see *London and North Western Railway Company v. Lindsay*, 3 Macq. 99.

We think, and this is all that we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal.

We think, therefore, that the rule must be made absolute.

*Rule absolute.*¹

¹ *Acc. McEwen v. Zimmer*, 38 Mich. 765; *Scott v. Noble*, 72 Pa. 115; *Tillinghast v. Boston, &c., Co.*, 39 S. C. 484, 18 S. E. 120. See *Comber v. Leyland*, [1898] A. C. 524. — Ed.

SIRDAR GURDYAL SINGH v. THE RAJAH OF FARIDKOTE.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1894.

[Reported [1894] *Appeal Cases*, 670.]

THE judgment of their lordships was delivered by the
 EARL OF SELBORNE. The respondent, the Rajah of Faridkote, obtained in the civil court of that native state, in 1879 and 1880, two *ex parte* judgments, in two suits instituted by him against the appellant, for sums amounting together to Rs. 76,474 11*a*. 3*p*., and costs. For all the purposes of the question to be now decided, those two suits may be treated as one; the appeals to Her Majesty in council having been consolidated. Two actions, founded on these judgments, were brought by the rajah against the appellant in the court of the assistant commissioner of Lahore, and were dismissed by that court, on the ground that the judgments were pronounced by the Faridkote court, without jurisdiction as against the appellant. On appeal to the additional commissioner of Lahore, the judgments of the first court were upheld. The rajah then appealed to the chief court of the Punjab, which differed from both those tribunals, and upheld the jurisdiction of the Faridkote court.

Faridkote is a native state, the rajah of which has been recognized by Her Majesty as having an independent civil, criminal, and fiscal jurisdiction. The judgments of its courts are, and ought to be, regarded in Her Majesty's courts of British India as foreign judgments. The additional commissioner of Lahore thought that no action could be brought in Her Majesty's courts upon a judgment of a native state; but in this opinion their lordships do not concur.

The appellant was for five years, beginning in 1869, in the service of the late Rajah of Faridkote as his treasurer; and the causes of action, on which the suits in the Faridkote court were brought, arose within that state, and out of that employment of the appellant by the late rajah. The claim made in each of the suits was merely personal, for money alleged to be due, or recoverable in the nature of damages, from the appellant. It is immaterial, in their lordships' view, to the question of jurisdiction (which is the only question to be now decided) whether the case, as stated, ought to be regarded as one of contract or of tort.

The appellant left the late rajah's service, and ceased to reside within his territorial jurisdiction, in 1874. He was from that time generally resident in another independent native state, that of Jhind, of which he was a native subject and in which he was domiciled; and he never returned to Faridkote after he left it in 1874. He was in Jhind when he was served with certain processes of the Faridkote court, as to which it is unnecessary for their lordships to determine what the effect would have been if there had been jurisdiction. He disregarded them, and never appeared in either of the suits instituted by the rajah, or other-

wise submitted himself to that jurisdiction. He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that court had lawful jurisdiction over him.

Under these circumstances there was, in their lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the court to which the defendant is subject at the time of suit (*actor sequitur forum rei*), which is rightly stated by Sir Robert Phillimore (International Law, vol. iv., s. 891) to "lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and *extra territorium jus dicenti, impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e. g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign court ought to recognize against foreigners, who owe no allegiance or obedience to the power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.

These are doctrines laid down by all the leading authorities on international law; among others, by Story (Conflict of Laws, 2d ed., sects. 6, 549, 553, 554, 556, 586), and by Chancellor Kent (Commentaries, del. i., p. 284, note c, 10th ed.), and no exception is made to them, in favor of the exercise of jurisdiction against a defendant not otherwise subject to it, by the courts of the country in which the cause of action arose, or (in cases of contract) by the courts of the *locus solutionis*. In those cases, as well as all others, when the action is personal, the courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

The conclusion of the learned judges in the chief court of the Punjab is expressed in the following sentence of the judgment delivered by Sir Meredyth Plowden in the first of the two actions:—

"On the whole, I think it may be said, that a State assuming to exercise jurisdiction over an absent foreigner, in respect of an obligation arising out of a contract made by the foreigner while resident in the

state and to be fulfilled there, is not acting in contravention of the general practice or the principles of international law, so that its judgment should not be binding merely on the ground of the absence of the defendant."

If this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. No authority, of any relevancy, was cited at their lordships' bar to support it, except *Becquet v. Macarthy*, 2 B. & Ad. 951, and a passage from the judgment delivered by Blackburn, J., in *Schibsby v. Westenholz*.

Of *Becquet v. Macarthy*, it was said by great authority in *Don v. Lippman*, 5 Cl. & F. 1, that it "had been supposed to go to the verge of the law;" and it was explained (as their lordships think, correctly) on the ground that "the defendant held a public office in the very colony in which he was originally sued." He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a colonial government, it would, in their lordships' opinion, have been wrongly decided; and it is evident that Fry, L. J., in *Rousillon v. Rousillon*, 14 Ch. D. 351, took that view.

The words of Blackburn, J.'s, judgment, in *Schibsby v. Westenholz*, which were relied upon, are these:—

"If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued."

Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the court; and, if this was what Blackburn, J., meant, their lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon

the question itself, which was determined in *Schibsy v. Westenholz*, Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the *forum loci contractus*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their lordships do) to the conclusion, that such obligation, unless expressed, could not be implied.

Their lordships will therefore humbly advise Her Majesty to reverse the decrees of the chief court of the Punjaub, and to restore those of the additional commissioner of Lahore. The respondent will pay the costs of the appeals to the courts below and of these appeals.

HENDERSON v. STANIFORD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1870.

[*Reported 105 Massachusetts, 504.*]

CONTRACT on a promissory note dated October 20, 1864, made by the defendant payable in one month to the order of the plaintiff, who was described in the writ (which was dated January 20, 1869), as of Crescent City in the county of Del Norte and State of California. The answer put the plaintiff to his proof concerning the making of the note, and set up "that if the plaintiff shall show that the defendant made the note, then the defendant answers that there is a judgment upon said note in the county of Del Norte and State of California, against the defendant and in favor of the plaintiff, and the same has never been reversed, reviewed, or annulled, but is still in force against the defendant in said State, where said contract was made, and where said defendant for a long time, to wit, from the year 1849 until some time in the year 1867, had his residence, — that he came to the State of Massachusetts some time in the year 1867, but with the intention in a short time of returning to the State of California."

The parties stated the case, referring to the pleadings, admitting the making of the note by the defendant, and continuing as follows: "In the year 1849 the defendant went from Massachusetts to California, and voted and was taxed there until he returned to Massachusetts in the year 1867. When he came to Massachusetts it was his intention to return to California, but in consequence of domestic affliction he has remained here. While in California he had his residence in the township of Crescent, otherwise known as Crescent City. In June, 1868, the plaintiff commenced an action before a justice's court, against

this defendant, in Crescent township and county of Del Norte, where said defendant had resided, upon the note in this suit, notice of the pendency of said action being duly given by publication; and the same was prosecuted to final judgment upon default, the defendant not appearing personally or by counsel. Said judgment has never been arrested, reversed, reviewed, or annulled, but is now a valid and unsatisfied judgment in full force in the State of California. Upon the above facts it is agreed that the court may render such judgment as is warranted by the pleadings." The superior court gave judgment for the defendant, and the plaintiff appealed.

WELLS, J. The defendant was not in California when the action was commenced against him there; nor at any time during its pendency. No service of process or notice was ever made upon him personally. He did not appear by counsel, or otherwise, nor assent to the judgment, which was rendered upon his default of appearance. But he had been, for a long time before that, a citizen of California; the contract was made there; and that continued to be his legal domicile when the judgment was rendered. He was, therefore, upon principles of international right, subject to the laws, and to the jurisdiction of the courts of that State. Story Conf. Laws, §§ 546, 548; *Hall v. Williams*, 6 Pick. 232, 240; *Gillespie v. Commercial Insurance Co.*, 12 Gray, 201. In Massachusetts, jurisdiction is assumed to be exercised in suits against parties who have been inhabitants of the State, although not so at the time of action brought. Gen. Sts. c. 126, § 1; *Morrison v. Underwood*, 5 Cush. 52; *Orcutt v. Ranney*, 10 Cush. 183. We must presume that the exercise of jurisdiction, in the suit in question, was in accordance with the laws of California. The agreed facts state that the judgment "is now a valid and unsatisfied judgment, in full force in the State of California."¹

DARRAH v. WATSON.

SUPREME COURT OF IOWA. 1873.

[Reported 36 Iowa, 116.]

MILLER, J.² The judgment record, on which this action is brought, shows that the action was commenced in the county court of Monongalia County, Virginia (now West Virginia), by the issuance of a summons, returnable on the first Monday of June, 1859. The sheriff's return on the summons shows a personal service thereof on the 6th day of June, 1859. . . .

¹ The remainder of the opinion, in which the effect of the judgment is discussed, is here omitted.

Acc. *Hunt v. Hunt*, 72 N. Y. 217; *Frothingham v. Barnes*, 9 R. I. 474 (*semble*).—Ed.

² Part of the opinion is omitted. — Ed.

On the trial the defendant Watson was sworn as a witness, and testified that during the year 1859, he resided in Greene County, Pennsylvania, and had so resided there for about three or four years prior to June, 1859, and never afterward resided in the State of Virginia; that during the month of June, 1859, he went from his residence in Pennsylvania into Monongalia County, Virginia, temporarily and on business; was there only two or three hours and returned again to Greene County, Pennsylvania, which latter county adjoins Monongalia County, Virginia; that while thus in the latter county he was served with some kind of paper or process, which was the only paper or process ever served on him in said county; that he paid no attention to the matter, never appeared in the action, made no defence and authorized no one to appear for him. Whereupon defendant's counsel asked the court to instruct the jury in substance, that if they found that the defendant, at the time of the rendition of the judgment in Virginia, was not a resident of or domiciled in said State, but was a resident of and domiciled in the State of Pennsylvania; that defendant, when the summons or original process was served upon him, was in the State of Virginia only for a few hours temporarily and on business; that defendant never afterward resided in said State; that defendant did not appear to the action or authorize any one to appear for him, then the county court of Monongalia County, Virginia, did not, by virtue of such service or by any proceedings in said action, acquire jurisdiction of the person of defendant to render a personal judgment as would be binding against him in this State.

This instruction was refused, and this ruling is assigned as error.

We have before said that the insufficiency of the service of the summons would not have the effect to render the judgment void as for want of jurisdiction. But it is insisted by appellant's counsel that "even admitting that the summons had been served in time and personally on defendant in Virginia," the court did not acquire jurisdiction of the defendant who was a resident of another State, and never afterward was a resident of Virginia, but was merely temporarily therein when he was served with original process in the action. The position assumed by counsel is, that the courts of Virginia could not acquire jurisdiction of the person of a citizen and resident of Pennsylvania by the service of original process upon him while temporarily in the former State on business.

The doctrine is well settled that no State can by its judgments rendered in its courts bind personally a defendant who is not within its jurisdiction, and on whom no notice has been served. *Melhop & Kingman v. Doane & Co.*, 31 Iowa, 397, and cases cited. And that to entitle a judgment rendered in one State to the full faith and credit mentioned in the Constitution and laws of the United States the court must have had jurisdiction not only of the subject-matter, but of the person of the defendant. *Ibid.* But is it true that the courts of one State cannot acquire jurisdiction of the person of a citizen and resi-

dent of a sister State by the service of original process upon such citizen within the jurisdiction of the former State? We think it is not. In the only case cited by appellant's counsel, *Bissell v. Briggs*, 9 Mass. 462, Chief Justice Parsons, on page 470, says: "Now, an inhabitant of one State may, without changing his domicile, go into another; he may there contract a debt or commit a tort, and while there he owes a temporary allegiance to that State, is bound by its laws, and is amenable to its courts." We have found no case holding a contrary doctrine to this.

Applying this doctrine to the case before us, we hold that the county court of Virginia did acquire jurisdiction of the person of the defendant by the service of the summons upon him while temporarily within its local jurisdiction, and that its judgment is entitled to the same faith and credit in this State as it was entitled by the laws of the State where rendered. The court below did not err, therefore, in refusing the instruction asked, and its judgment is *Affirmed*.¹

ST. CLAIR v. COX.

SUPREME COURT OF THE UNITED STATES. 1882.

[*Reported 106 United States, 350.*]

FIELD, J. This action was brought by the plaintiff in the court below, to recover the amount due on two promissory notes of the defendants, each for the sum of \$2,500, bearing date on the 2d of August, 1877, and payable five months after date, to the order of the Winthrop Mining Company, at the German National Bank, in Chicago, with interest at the rate of seven per cent per annum.

To the action the defendants set up various defences, and, among others, substantially these: That the consideration of the notes had failed; that they were given, with two others of like tenor and amount, to the Winthrop Mining Company, a corporation created under the laws of Illinois, in part payment for ore and other property sold to the defendants upon a representation as to its quantity, which proved to be incorrect; that only a portion of the quantity sold was ever delivered, and that the value of the deficiency exceeded the amount of the notes in suit; that at the commencement of the action, and before the transfer of the notes to the plaintiff, the Winthrop Mining Company was indebted to the defendants in a large sum, viz. \$10,000, upon a judgment recovered by them in the Circuit Court of Marquette County, in the State of Michigan, and that the notes were transferred to him after their maturity and dishonor, and after he had notice of the defences to them.

¹ *Acc. Alley v. Caspari*, 80 Me. 234, 14 Atl. 12; *Thompson v. Cowell*, 148 Mass. 552.—Ed.

On the trial, evidence was given by the defendants tending to show that the plaintiff was not a *bona fide* holder of the notes for value. A certified copy of that judgment was also produced by them and offered in evidence; but on his objection that it had not been shown that the court had obtained jurisdiction of the parties, it was excluded, and to the exclusion an exception was taken. The jury found for him for the full amount claimed; and judgment having been entered thereon, the defendants brought the case here for review. The ruling of the court below in excluding the record constitutes the only error assigned.

The judgment of the Circuit Court in Michigan was rendered in an action commenced by attachment. If the plaintiffs in that action were, at its commencement, residents of the State, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached, cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability beyond the amount which the proceeds of the property discharged. There was no appearance of the company in the action, and judgment against it was rendered for \$6,450 by default. The officer, to whom the writ of attachment was issued, returned that, by virtue of it, he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county."

Sheriff's return.

The laws of Michigan provide for attaching property of absconding, fraudulent, and non-resident debtors and of foreign corporations. They require that the writ issued to the sheriff, or other officer by whom it is to be served, shall direct him to attach the property of the defendant, and to summon him if he be found within the county, and also to serve on him a copy of the attachment and of the inventory of the property attached. They also declare that where a copy of the writ of attachment has been personally served on the defendant, the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons. 2 Comp. Laws, 1871, sects. 6397 and 6418.

They also provide, in the chapter regulating proceedings by and against corporations, that "suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a

corporation, may be served on the presiding officer, the cashier, the secretary, or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct;" and that "in suits commenced by attachment in favor of a resident of this State against any corporation created by or under the laws of any other State, government, or country, if a copy of such attachment and of the inventory of property attached shall have been personally served on any officer, member, clerk, or agent of such corporation within this State, the same proceedings shall be thereupon had, and with like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant." 2 Comp. Laws, 1871, sects. 6544 and 6550.

The courts of the United States only regard judgments of the State courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In *Pennoyer v. Neff* we had occasion to consider at length the manner in which State courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in the Federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a State to determine the status of one of its citizens towards a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S. 714.

The doctrine of that case applies, in all its force, to personal judgments of State courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the State where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the State will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the State is passed difficulties arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it.

Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the

State by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his State, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

In *McQueen v. Middleton Manufacturing Co.*, decided in 1819, the Supreme Court of New York, in considering the question whether the law of that State authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the State, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that if the president of a bank went to New York from another State he would not represent the corporation there; and that "his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." 16 Johns. (N. Y.) 5. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but nevertheless it has been accepted as correctly stating the law. It was cited with approval by the Supreme Court of Massachusetts, in 1834, in *Peckham v. North Parish in Haverhill*, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the Commonwealth. 16 Pick. (Mass.) 274. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with suggestions that the doctrine might be otherwise if the foreign corporation sent its officer to reside in the State and transact business there on its account. *Libbey v. Hodgdon*, 9 N. H. 394; *Moulin v. Trenton Insurance Co.*, 24 N. J. L. 222.

This doctrine of the exemption of a corporation from suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States. To meet and obviate this inconvenience and injustice, the legislatures of several States interposed, and provided for service of process on officers and agents of

foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the States for which they are respectively appointed when it is called to legal responsibility for their transactions.

The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other States, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the State where it was created.

A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in *Lafayette Insurance Co. v. French*: "These conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." 18 How. 404, 407; *Paul v. Virginia*, 8 Wall. 168.

The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a

condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in *Lafayette Insurance Co. v. French*, to which we have already referred, sustains these views.¹

The State of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the State. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on "any officer, member, clerk, or agent of such corporation" within the State, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that State is made to serve a double purpose, — as a command to the officer to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the State, and the agent be appointed to act there. We so construe the words "agent of such corporation within this State." They do not sanction service upon an officer or agent of the corporation who resides in another State, and is only casually in the State, and not charged with any business of the corporation there. The decision in *Newell v. Great Western Railway Co.*, reported in the 19th of Michigan Reports, supports this view, although that was the case of an attempted service of a declaration as the commencement of the suit. The defendant was a Canadian corporation owning and operating a railroad from Suspension Bridge in Canada to the Detroit line at Windsor opposite Detroit, and carrying passengers in connection with the Michigan Central Railroad Company, upon tickets sold by such companies respectively. The suit was commenced in Michigan, the declaration alleging a contract by the defendant to carry the plaintiff over its road, and its violation of the

¹ *Acc. Compagnie Générale Transatlantique v. Law*, [1899] A. C. 431; *Fireman's Ins. Co. v. Thompson*, 155 Ill. 204, 40 N. E. 488; *Reyer v. Odd Fellows' Acc. Assoc.*, 157 Mass. 367. — *En.*

contract by removing him from its cars at an intermediate station. The declaration was served upon Joseph Price, the treasurer of the corporation, who was only casually in the State. The corporation appeared specially to object to the jurisdiction of the court, and pleaded that it was a foreign corporation, and had no place of business or agent or officer in the State, or attorney to receive service of legal process, or to appear for it; and that Joseph Price was not in the State at the time of service on him on any official business of the corporation. The plaintiff having demurred to this plea, the court held the service insufficient. "The corporate entity," said the court, "could by no possibility enter the State, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of an officer or agent. To involve the representation of the company here, the supposed representative would have to hold or enjoy in this State an actual present official or representative status. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative character at the frontier, if he should bring that character no further than the territorial boundary of the government to whose laws the corporate body itself, and consequently the official positions of its officers also, would be constantly indebted for existence, it could not, with propriety, be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so when the treasurer, the then official, the officer then in a manner impersonating the company, should be served. Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining the business or act of any besides himself. He had no principal, and he was not an agent. He had no official status or representative character in this State." 19 Mich. 344.

According to the view thus expressed by the Supreme Court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the State. This representation implies that the corporation does business, or has business, in the State for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the State, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former State, the Supreme Court of New Jersey said, that a law of another

State which sanctioned such service upon an officer accidentally within its jurisdiction was "so contrary to natural justice and to the principles of international law, that the courts of other States ought not to sanction it." *Moulin v. Trenton Insurance Co.*, 24 N. J. L. 222, 234.

Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute — a member, for instance, of the foreign corporation, that is, a mere stockholder — is not a departure from the principle of natural justice mentioned in *Lafayette Insurance Co. v. French*, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record — either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court — that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the State when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the State court, gave no information on the subject. It did not, therefore, appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

Judgment affirmed.

COPIN v. ADAMSON.

EXCHEQUER. 1874.

[*Reported Law Reports, 9 Exchequer, 345.*]

DECLARATION by the assignee in bankruptcy of the Société de Commerce de France, Limited, on a judgment for £151 15s. recovered on the 7th of February, 1867, in the empire of France, by him against the defendant in the Court of the Tribunal of Commerce of the Department of the Seine, being a court duly holden, and having jurisdiction in that behalf.

Plea. 3. That the suit was commenced, according to the French law, by process and summons, and that the defendant was not at any time previous to the recovery of judgment resident or domiciled within the jurisdiction of the said court, nor is he a native of France, and he was not served with any process or summons, nor did he appear, nor had he any notice or knowledge of any process or summons, or any opportunity of defending himself.

Replications. 1. That defendant was shareholder in a French company, the articles of which provided that every shareholder must elect some domicile in Paris, or in default thereof would be taken to be domiciled at the office of an imperial procurator, for the purpose of service of process in all disputes arising out of the liquidation of the company between the shareholders and the company; and that such disputes should be submitted to the proper French court. That service was made accordingly, as provided by French law.

2. That the law of France contained similar provisions.¹

AMPHLETT, B. An important question is raised on these replications, involving the liability of a British subject to be sued in the courts of a foreign country. As to the first replication demurred to, the court is unanimously of opinion that the defendant is shown upon the face of it to have contracted with the company, of which he is a shareholder, and whose representative the plaintiff is, that he would, under the circumstances disclosed, be amenable to the jurisdiction of the Court of the Tribunal of Commerce of the Department of the Seine. But as to the second replication, my brother Pigott and myself think that although the allegations are sufficient to show that the defendant's contract is to be governed by French law, still that they do not show that he is subject to the jurisdiction of the French court. The contract must be interpreted by an English tribunal.

Now, the plaintiff seems to have thought that all he need allege is that French law is to govern the contract. But it by no means follows that the defendant has subjected himself to a foreign jurisdiction. The cases which have been referred to show that before an Englishman can be made amenable to a foreign court, he must bear either

¹ The replications, stated at length by the reporter, are here abridged. — Ed.

an absolute or a qualified or temporary allegiance to the country in which the court is. He must, as is pointed out by Blackburn, J., in *Schibsby v. Westenholz*, Law Rep. 6 Q. B. 155, p. 161, be a subject of the country, or as a resident there when the action was commenced (or perhaps it would be enough if he were there when the obligation was contracted, though upon this point doubt is expressed), so as to be under the protection of or amenable to its laws. The learned judge also puts two other cases in which a person might be bound, — one where he, as plaintiff, has selected his tribunal, and the other where he has voluntarily appeared before it and takes the chance of a judgment in his favor. The defendant's liability in the latter case, however, is left an open question. But independently of that question, I apprehend that a man may contract with others that his rights shall be determined not only by foreign law, but by a foreign tribunal, and thus, by reason of his contract, and not of any allegiance absolute or qualified, would become bound by that tribunal's decision. It is upon this ground that I decide the demurrer to the first replication in the plaintiff's favor. I think that the defendant must be taken to have agreed that if he did not elect a domicile one should be elected for him; for the articles of association provide for its being done. It is said that it is not sufficiently stated that he had notice of this particular provision; but I think it must be implied that he had notice, from the fact of his becoming a shareholder in the company.

I now proceed to consider the second replication, which is silent as to the statutes or articles of association, but simply alleges that according to French law the members of the company were bound to elect a domicile; and that, according to French law, upon default a domicile would be elected for them at a public office, where process might be served, and that they would be bound thereby. I confess I cannot find a case which has gone so far as to hold a defendant liable, under such circumstances, upon a foreign judgment obtained, as this was, without any knowledge on his part of the proceedings. Can it be said that an Englishman, for example, who buys a share in a foreign company on the London Stock Exchange, thereby becomes necessarily bound by any decision to which the foreign tribunal may come upon a matter affecting his interests? Suppose there had been a provision by the law of France that whenever a member neglected to elect a domicile he should pay double calls, are we to enforce his liability in an action on a judgment for such calls obtained against him without his knowledge in the foreign court? No doubt in the present case, where the law of France is in question, the probability is that the shareholder would not be subjected to any extraordinary or unjust liabilities. But if the principle of law is that which the plaintiff contends for, it must be applied in cases of countries where the law might be very much more open to objection than it is likely to be in a country such as France.

It is said, however, that the authorities upon the point are decisive,

and two were especially relied on. The first was the *Bank of Australasia v. Harding*, 9 C. B. 661, 19 L. J. (C. P.) 345; and it is, I agree, a strong authority in support of the first replication, but not of the second. In that case there had been a local act obtained giving power to the company's creditors to obtain judgment against a representative of all the members, and enacting that by that judgment all the members should be bound; and it was upon the circumstance that the act existed that the judgment of the court was founded; and nothing falls from any of the judges to indicate that they would have held the defendant bound if there had been no such act. In their opinion the defendant was to be considered as a consenting party to the passing of the act, or as one of the parties at whose request it was passed, and therefore bound by its provisions. See per Wilde, C. J., and Cresswell, J., pp. 685, 687. In the absence of such consent, it seems to me that the court would have come to a contrary conclusion.

The second case relied on was *Vallée v. Dumergue*, 4 Ex. 290, 18 L. J. (Ex.) 398; but here, again, although the decision supports the first, it fails to support the second replication. There the defendant had become by transfer the owner of shares in a French company; and upon accepting the shares was bound, according to French law, to elect a domicile. He actually did so, and gave notice of his election to the company. He was, therefore, aware of what the French law was, and had complied with it. Then, having left the country, notice of process was, as here, left at the elected domicile, but never reached the defendant against whom judgment by default was recovered. It was held he was liable on the judgment, but upon the ground that he had done something more than become a shareholder in the company; he had so conducted himself as to warrant the inference that he had agreed to be bound by the decision of the foreign court. "The replication consists," says Alderson, B. (p. 303) "of a statement of facts which show that by the agreement to which the defendant has become a party, no actual notice need be given to him;" and, again (p. 303), "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode has been followed, even though he may not have had actual notice of them."

For these reasons my judgment (in which my brother Pigott concurs) is for the plaintiff upon the demurrer to the first replication, and for the defendant upon the demurrer to the second.

Judgment accordingly.

KELLY, C. B. [dissenting on the second replication.]

GROVER AND BAKER SEWING MACHINE CO. v.
RADCLIFFE.

SUPREME COURT OF THE UNITED STATES. 1890.

[*Reported 137 United States, 287.*]

Error to the Court of Appeals of the State of Maryland.

This was an action brought in the Circuit Court of Cecil County, Maryland, by the Grover and Baker Sewing Machine Company against James and John Bengé, citizens of Delaware, by summons and attachment served on William P. Radcliffe as garnishee. The suit was upon a judgment for the sum of three thousand dollars, entered by the prothonotary of the Court of Common Pleas in and for the county of Chester, Pennsylvania, against James and John Bengé (who were not citizens or residents of Pennsylvania and were not served with process) upon a bond signed by them, giving authority to "any attorney of any court of record in the State of New York or any other State" to confess judgment against them for the amount of the bond. The law of Pennsylvania authorized the prothonotary of any court to enter judgment upon such a bond.¹

FULLER, C. J. The Maryland Circuit Court arrived at its conclusion upon the ground that the statute of Pennsylvania relied on did not authorize the prothonotary of the Court of Common Pleas of that State to enter the judgment; and the Court of Appeals of Maryland reached the same result upon the ground that the judgment was void as against John Bengé, because the court rendering it had acquired no jurisdiction over his person.

It is settled that notwithstanding the provision of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," Art. IV., section I, and the acts of Congress passed in pursuance thereof, 1 Stat. 22, Rev. Stat. § 905 — and notwithstanding the averments in the record of the judgment itself, the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding; that the jurisdiction of a foreign court over the person or the subject-matter, embraced in the judgment or decree of such court, is always open to inquiry; that, in this respect, a court of another State is to be regarded as a foreign court; and that a personal judgment is without validity if rendered by a State court in an action upon a money demand against a non-resident of the State, upon whom no personal service of process within the State was made, and who did not appear. *D'Arcy v. Ketchum*, 11 How. 165; *Thompson v. Whitman*, 18 Wall. 457; *Hall v. Lanning*, 91 U. S. 160; *Pennoyer v. Neff*, 95 U. S. 714.

¹ This statement is abridged from the statement of FULLER, C. J. — ED.

The rule is not otherwise in the State of Pennsylvania, where the judgment in question was rendered; *Guthrie v. Lowry*, 84 Penn. St. 533; *Scott v. Noble*, 72 Penn. St. 115; *Noble v. Thompson Oil Co.*, 79 Penn. St. 354; *Steel v. Smith*, 7 W. & S. 447; nor in the State of Maryland, where the action under review was brought upon it; *Bank of the United States v. Merchants' Bank*, 7 Gill, 415; *Clark v. Bryan*, 16 Maryland, 171; *Weaver v. Boggs*, 38 Maryland, 255. And the distinction between the validity of a judgment rendered in one State, under its local laws upon the subject, and its validity in another State, is recognized by the highest tribunals of each of these States.

Thus in *Steel v. Smith*, 7 W. & S. 447, it was decided, in 1844, that a judgment of a court of another State does not bind the person of the defendant, in another jurisdiction, though it might do so under the laws of the State in which the action was brought, and that the act of Congress does not preclude inquiry into the jurisdiction, or the right of the State to confer it. The action was brought on a judgment rendered in Louisiana, and Mr. Chief Justice Gibson, in delivering the opinion of the court, said: "The record shows that there was service on one of the joint owners, which, in the estimation of the law of the court, is service on all; for it is affirmed in *Hill v. Bowman*, already quoted [14 La. 445], that the State of Louisiana holds all persons amenable to the process of her courts, whether citizens or aliens, and whether present or absent. It was ruled in *George v. Fitzgerald*, 12 La. 604, that a defendant, though he reside in another State, having neither domicile, interest nor agent in Louisiana, and having never been within its territorial limits, may yet be sued in its courts by the instrumentality of a curator appointed by the court to represent and defend him. All this is clear enough, as well as that there was in this instance a general appearance by attorney, and a judgment against all the defendants, which would have full faith and credit given to it in the courts of the State. But that a judgment is always regular when there has been an appearance by attorney, with or without warrant, and that it cannot be impeached collaterally, for anything but fraud or collusion, is a municipal principle, and not an international one having place in a question of State jurisdiction or sovereignty. Now, though the courts of Louisiana would enforce this judgment against the persons of the defendants, if found within reach of their process, yet, where there is an attempt to enforce it by the process of another State, it behooves the court whose assistance is invoked to look narrowly into the constitutional injunction, and give the statute to carry it out a reasonable interpretation." pp. 449, 450.

Referring to § 1307 of Mr. Justice Story's Commentaries on the Constitution, and the cases cited, to which he added *Benton v. Burgot*, 10 S. & R. 240, the learned Judge inquired: "What, then, is the right of a State to exercise authority over the persons of those

who belong to another jurisdiction, and who have perhaps not been out of the boundaries of it?" (p. 450) and quoted from Vattel, Burge, and from Mr. Justice Story (Conflict of Laws, c. 14, § 539), that "'no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals,'" and thus continued: "Such is the familiar, reasonable, and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the revolution. Certainly it was not intended to legitimate an assumption of extraterritorial jurisdiction which would confound all distinctive principles of separate sovereignty; and there evidently was such an assumption in the proceedings under consideration. . . . But I would perhaps do the jurisprudence of Louisiana injustice, did I treat its cognizance of the defendants as an act of usurpation. It makes no claim to extraterritorial authority, but merely concludes the party in its own courts, and leaves the rest to the Constitution as carried out by the act of Congress. When, however, a creditor asks us to give such a judgment what is in truth an extraterritorial effect, he asks us to do what we will not, till we are compelled by a mandate of the court in the last resort." p. 451.

In *Weaver v. Boggs*, 38 Maryland, 255, it was held that suit could not be maintained in the courts of Maryland upon a judgment of a court of Pennsylvania rendered upon returns of *nihil* to two successive writs of *scire facias* issued to revive a Pennsylvania judgment of more than twenty years' standing, where the defendant had for more than twenty years next before the issuing of the writs resided in Maryland and out of the jurisdiction of the court that rendered the judgment. The court said: "It is well settled that a judgment obtained in a court of one State cannot be enforced in the courts and against a citizen of another, unless the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered and enforced there even against the property, effects, and credits, of a non-resident defendant there situated; but it cannot be enforced or made the foundation of an action in another State. A law which substitutes constructive for actual notice is binding upon persons domiciled within the State where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits. This rule is based upon international law, and upon that natural protection which every country owes to its own citizens. It concedes the jurisdiction of the court to the extent of the State where

the judgment is rendered, but upon the principle that it would be unjust to its own citizens to give effect to the judgments of a foreign tribunal against them when they had no opportunity of being heard, its validity is denied."

Publicists concur that domicile generally determines the particular territorial jurisprudence to which every individual is subjected. As correctly said by Mr. Wharton, the nationality of our citizens is that of the United States, and by the laws of the United States they are bound in all matters in which the United States are sovereign; but in other matters, their domicile is in the particular State, and that determines the applicatory territorial jurisprudence. A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment; and it is competent for a defendant in an action on a judgment of a sister State, as in an action on a foreign judgment, to set up as a defence, want of jurisdiction, in that he was not an inhabitant of the State rendering the judgment and had not been served with process, and did not enter his appearance. Whart. Conflict Laws, §§ 32, 654, 660; Story, Conflict Laws, §§ 539, 540, 586.

John Benge was a citizen of Maryland when he executed this obligation. The subject-matter of the suit against him in Pennsylvania was merely the determination of his personal liability, and it was necessary to the validity of the judgment, at least elsewhere, that it should appear from the record that he had been brought within the jurisdiction of the Pennsylvania court by service of process, or his voluntary appearance, or that he had in some manner authorized the proceeding. By the bond in question he authorized "any attorney of any court of record in the State of New York, or any other State, to confess judgment against him (us) for the said sum, with release of errors, etc." But the record did not show, nor is it contended, that he was served with process, or voluntarily appeared, or that judgment was confessed by an attorney of any court of record of Pennsylvania. Upon its face, then, the judgment was invalid, and to be treated as such when offered in evidence in the Maryland court.

It is said, however, that the judgment was entered against Benge by a prothonotary, and that the prothonotary had power to do this under the statute of Pennsylvania of February 24, 1806. Laws of Penn. 1805-6, p. 347. This statute was proved as a fact upon the trial in Maryland, and may be assumed to have authorized the action taken, though under *Connay v. Halstead*, 73 Penn. St. 354, that may, perhaps, be doubtful. And it is argued that the statute, being in force at the time this instrument was executed, should be read into it and considered as forming a part of it, and therefore that John Benge had consented that judgment might be thus entered up against him without service of process, or appearance in person, or by attorney.

But we do not think that a citizen of another State than Pennsylvania can be thus presumptively held to knowledge and acceptance of particular statutes of the latter State. What Bengé authorized was a confession of judgment by any attorney of any court of record in the State of New York or any other State, and he had a right to insist upon the letter of the authority conferred. By its terms he did not consent to be bound by the local laws of every State in the Union relating to the rendition of judgment against their own citizens without service or appearance, but on the contrary made such appearance a condition of judgment. And even if judgment could have been entered against him, not being served and not appearing, in each of the States of the Union, in accordance with the laws therein existing upon the subject, he could not be held liable upon such judgment in any other State than that in which it was so rendered, contrary to the laws and policy of such State.

The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another State to override their own.

No color to any other view is given by our decisions in *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 400, and *Hopkins v. Orr*, 124 U. S. 510, cited for plaintiff in error. Those cases involved the rendition of judgments against sureties on restitution and appeal bonds if judgment went against their principals, and the sureties signed with reference to the particular statute under which each bond was given; nor did, nor could, any such question arise therein as that presented in the case at bar.

*Judgment affirmed.*¹

FITZSIMMONS v. JOHNSON.

SUPREME COURT OF TENNESSEE. 1891.

[Reported 90 *Tennessee*, 416.]

CALDWELL, J.² John W. Todd died, testate, at his residence in Clermont County, Ohio, in the early part of the year 1864. He nominated his friends, John Johnson and C. W. Goyer, of Memphis, Tennessee, as executors of his will. They accepted the trust, went to Ohio, and, on April 27, 1864, were duly qualified by the Probate Court of Clermont County as executors of the will.

¹ See *First Nat. Bank v. Cunningham*, 48 Fed. 510; *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306; *Teel v. Yost*, 128 N. Y. 387.

On consent as a ground of jurisdiction of the person, see *Wright v. Boynton*, 37 N. H. 9; *McCormick v. R. R.*, 49 N. Y. 303. — Ed.

² Only so much of the opinion as deals with the question of jurisdiction is here given. — Ed.

On November 6, 1865, the executors made what purported to be a final settlement of the estate of their testator, showing that they had received assets to the amount of \$63,495.25, and that, of this, they had paid to the widow of the testator, as sole distributee, \$61,040.10, and that the other \$2,455.15 had been used in the payment of debts and expenses of administration. This settlement was made in the Probate Court of Clermont County, Ohio, on whose record the following entry was made: "This day the court examined the accounts and vouchers of C. W. Goyer and John Johnson, executors of the estate of John W. Todd, deceased, and found the same to be in all things correct; that they have been regularly advertised for exceptions, and none having been filed thereto, the same are hereby approved and confirmed. And the court finds that said executors have paid all just claims against said estate, and have distributed the remainder according to the will of the testator. And the said accounts are ordered to be recorded, and the executors are discharged."

The testator left no children or representatives of children. By the first ten clauses of his will he expressed certain desires, which need not be mentioned in this opinion, and made provision for his widow; and by the eleventh clause he devised and bequeathed the residuum of his estate, both real and personal, to his four sisters and one brother. The provision made for the widow proved unsatisfactory to her; hence, she failed to accept it. And her non-acceptance had the same legal effect under the Ohio law that an affirmative dissent has under our law. She had the same claims upon her husband's estate as she would have had if he had died intestate.

The executors assumed that she was entitled to the whole of his personal estate after the payment of debts and expenses, and upon that assumption they paid her the \$61,040.10.

Such had been the statute law of Ohio, but it was changed, so as to allow the widow only one-third of her husband's net personal estate, a few years before the final settlement.

On January 15, 1887, Mary A. Fitzsimmons, one of the residuary legatees, filed her petition in error, in the Court of Common Pleas of Clermont County, Ohio, for the purpose of having the judgment of the Probate Court reviewed and reversed. Goyer having died in the meantime, Johnson alone, as surviving executor, was made defendant to this petition. The petition was accompanied with an affidavit that Johnson was a non-resident of the State of Ohio, and could not, therefore, be personally served with summons, that he had no attorney of record in the State, and that it was a proper case for publication. Thereupon publication was made for Johnson, as a non-resident, requiring him to appear and plead to the petition; and a copy of a newspaper containing the published notice was sent to him at his residence in Memphis, Tennessee.

Johnson made default, and on January 20, 1888, the petition in error was heard in the Court of Common Pleas, and the judgment of

the Probate Court was reversed and set aside, and the cause was remanded to the Probate Court for further proceedings. After the remand, Mrs. Fitzsimmons and Mrs. Young, another of the residuary legatees, appeared in the Probate Court and filed exceptions to the accounts of Goyer and Johnson, which had been confirmed by that court in 1865. These exceptions were set for hearing, and a copy thereof, together with a notice of the time and place of hearing the same by the court, was mailed to Johnson at Memphis.

Johnson again failed to appear. The exceptions were sustained, and, on February 2, 1888, the Probate Court adjudged that the executors had been improperly credited in the former settlement with the \$61,040.10 paid the widow, and that they had received \$30,000 besides, which they had not reported or accounted for in any way. The court further adjudged that these two sums, together with interest thereon, in all \$130,640, remained, or should be, in the hands of the executors for distribution; and it was ordered that Johnson, as surviving executor, proceed to distribute said sum of \$130,640 according to the will of John W. Todd, deceased, and according to law.

That judgment is the principal ground of the present action. On March 28, 1888, Mrs. Fitzsimmons and the other four residuary legatees, by themselves and their representatives, filed this bill in the Chancery Court at Memphis, to recover from Johnson, as surviving executor, and from the estate of Goyer, the deceased executor, the said \$130,640, and other sums alleged to have been received by the same persons as executors of John W. Todd's estate in Tennessee.

The chancellor dismissed the bill on demurrer, so far as relief was sought on the Ohio record, but retained it for other purposes, to be hereafter stated. After final decree on the merits of the other branch of the cause, both complainants and defendants appealed to this court. All material questions raised in the Chancery Court are presented here by assignments of error.

Was that part of the bill seeking relief on the judgment of the Probate Court in Ohio properly dismissed?

The main ground of demurrer to that part of the bill was want of jurisdiction in that court to pronounce the judgment.

The question of the court's jurisdiction of the subject-matter need not be discussed or elaborated, for, by the statute of Ohio, her Probate Courts are given general jurisdiction to settle the accounts of executors and administrators, and to direct distribution of balance found in their hands. Jurisdiction of the subject-matter was, therefore, ample and complete. Rev. Stat. Ohio, sect. 534.

Whether the court had jurisdiction of the person of Johnson is not so easily answered.

It is conceded in the bill and recited on the face of the record that Goyer was dead, and that Johnson, the surviving executor, was not personally served with notice, either of the appellate proceedings in

the Court of Common Pleas or of the subsequent proceedings in the Probate Court, which resulted in the judgment sued on; and that, being a non-resident, and without an attorney of record in the State, only publication was made for him.

It is now well settled that a personal judgment against a non-resident, rendered in an original suit, upon constructive notice — that is, upon notice by publication merely — is an absolute nullity, and of no effect whatever. Though a State may adopt any rules of practice and legal procedure she may deem best as to her own citizens, she can adopt none that will give her courts jurisdiction of non-residents so as to authorize personal judgments against them without personal service of process upon them.

By personal judgments we mean judgments *in personam* — as, for payment of money — in contradistinction from judgments *in rem*, whereby the property of non-residents, situated within the territorial limits of the State, may be impounded; for when non-residents own property in a particular State it is subject to the laws of that State, and may be attached or otherwise brought into *custodia legis* as security for the debts of the owners, and actually sold and applied by direction of the court, without personal service and by constructive notice merely. *Pennoyer v. Neff*, 95 U. S. 714.

The judgment before us is confessedly a personal judgment. Hence, if the appellate proceedings in the Court of Common Pleas and the subsequent proceedings in the Probate Court were original proceedings, standing upon the same ground with respect to notice as an original action, that judgment is void for want of jurisdiction of the person.

The demurrer assumed, and, in sustaining it, the chancellor held, that the petition in error, by which the cause was removed from the Probate Court to the Court of Common Pleas, was, in effect, an original action, and that it could be prosecuted only on notice by personal service; and that, it appearing that no such notice was given, the judgment sued upon was null and void.

We do not concur in the view that the petition in error was a new suit, or, that to entitle petitioner to prosecute the same, she must have given the defendant therein the same notice required in the commencement of an original action. In saying this, we are not unmindful of the fact that many of the authorities speak of a writ of error, whose office seems to be the same in most of the States as the petition in error under the Ohio law, as a new suit. Such is the language of some of the earlier decisions in Ohio. 3 Ohio, 337. In some of the cases in our own State a writ of error has been called a new suit (1 Lea, 290; 13 Lea, 151); in others it is said to be in the nature of a new suit (6 Lea, 83; 13 Lea, 206); and in still another the court says it is to be regarded as a new suit. 3 Head, 25. But in no case that we have been able to find, or to which our attention has been called, does the court decide that a writ of error

is a new suit in the sense of being the commencement of an original action, or that it requires the same character and stringency of notice as an original action.

In the very nature of the case a writ of error cannot be an original action. A writ of error lies alone in behalf of a party or privy to an original suit already finally determined in the lower court, and it must run against another party or privy to such original suit. A writ of error has no place in the law unless there has been an original action; and, where given scope, it is but a suit on the record in the original case.

The Supreme Court of the United States has several times said that a writ of error is rather a continuation of a certain litigation than the commencement of an original action, and we think that such it is, most manifestly. *Cohens v. Virginia*, 6 Wheaton, 410; *Clark v. Matthewson*, 12 Peters, 170; *Nations v. Johnson*, 24 Howard, 205; *Pennoyer v. Neff*, 95 U. S., 734.

A writ of error is like a new suit, in that it can be prosecuted only upon notice to the opposite party. But that notice need not be personal, as in the commencement of an original action; it may be either personal or constructive, as the State creating the tribunal may provide. 95 U. S., 734; 24 Howard, 206.

In 1865 Goyer and Johnson submitted themselves to the jurisdiction of the Probate Court of Ohio, for the purpose of settling their accounts, and then obtained a judgment in their favor. That judgment was subject to review, and, if erroneous, to reversal, by error proceedings in the Court of Common Pleas. Rev. Stat. Ohio, sect. 6708.

To obtain such revision or reversal, it was incumbent on the complaining party to give Goyer and Johnson, or the survivor of them, notice. Such notice was, by statute, authorized to be given in any one of three ways — namely, by service of summons on the adverse party in person, or by service on his attorney of record, or by publication. Rev. Stat., 6713.

Goyer being dead, and Johnson being a non-resident, and having no attorney in the State, publication was duly made at the instance of petitioner in error. That was all that was required by the law of Ohio, and we are of opinion that it gave the Appellate Court full jurisdiction of Johnson's person, and authorized any judgment that the merits of the case required, so far as he was concerned.

That court had complete power to reverse the judgment of the Probate Court, if found to be erroneous, and either to render such judgment as should have been rendered below in the first instance or to remand the case for further proceedings in the latter court. Rev. Stat., 6726.

The latter course was pursued, as has already been seen. Johnson, being properly before the Appellate Court by constructive service, was chargeable with notice of the reversal and remand of his

case, and of the subsequent proceedings in the Probate Court, without additional notice by publication or otherwise as to the steps taken under the *procedendo*. In that way he had his day in court when the large judgment was pronounced against him, and he is bound by it the same as if he had been personally served with process.

That constructive notice of a writ of error to a non-resident party, when such party was properly brought before the lower court, is sufficient to bind him by the judgment or decree rendered in the Appellate Court, was expressly decided in the case of *Nations v. Johnson*, 24 Howard, 195. In that case Johnson had sued Nations in the Chancery Court in Mississippi for some slaves. Decree was for Nations, and he afterward removed himself and the slaves to the State of Texas. Johnson prosecuted a writ of error to the Appellate Court of Mississippi, giving to Nations notice by publication only. The Appellate Court reversed the decree of the chancellor and pronounced a decree in favor of Johnson.

Subsequently Johnson sued Nations in one of the District Courts of the United States, in the State of Texas, on his decree rendered by the State Court in Mississippi. Nations defended on the ground that he had not been personally served with notice of the writ of error to the Appellate Court. That question being decided against him, not upon the facts but upon the law, in the District Court, Nations prosecuted a writ of error to the Supreme Court of the United States, with the result already stated. In the opinion, Mr. Justice Clifford, speaking for a unanimous court, said: "No rule can be a sound one which, by its legitimate operation, will deprive a party of his right to have his case submitted to the Appellate Court; and where, as in this case, personal service was impossible in the Appellate Court, through the act of the defendant in error, it must be held that publication according to the law of the jurisdiction, is constructive notice to the party, provided the record shows that process was duly served in the subordinate court, and that the party appeared and litigated the merits. . . . Common justice requires that a party, in cases of this description, should have some mode of giving notice to his adversary; and where, as in this case, the record shows that the defendant appeared in the subordinate court and litigated the merits to a final judgment, it cannot be admitted that he can defeat an appeal by removing from the jurisdiction, so as to render personal service of the citation impossible. On that state of facts, service by publication according to the law of the jurisdiction and the practice of the court, we think, is free from objection, and is amply sufficient to support the judgment of the Appellate Court." 24 Howard, 205, 206.

The same rule is announced in *Pennoyer v. Neff*, 95 U. S. 784.

Text-writers lay it down as a general rule that jurisdiction once acquired over the parties in the lower court may be continued until

the final termination of the controversy in the Appellate Court by giving proper notice of the appellate proceedings, and that notice to a non-resident party by publication merely is sufficient. Freeman on Judgments, sect. 569; 2 Black on Judgments, sect. 912.

This rule commends itself to all men for its wisdom and justice. If it did not prevail, a man having an unjust judgment in a subordinate court, might, by removal from that State, cut off, absolutely, the right of the adverse party to a hearing in the Appellate Court on writ of error; and, having done so, he might then enforce his unjust judgment. The adverse party would be powerless in such a case. He could get relief neither in the courts of the State in which the judgment was rendered, nor in those of the State to which the other party had removed; for, in the former jurisdiction, the judgment would be conclusive upon him, and if he should go to the latter to relitigate his rights, he would be met and defeated by the previous adjudication of the same rights. One judgment would control the other, on the doctrine that the judgment of a competent court in one State is entitled to the same faith and credit in the courts of every other State as it would receive in those of the State where rendered; which doctrine will be considered hereafter.

MASSIE v. WATTS.

SUPREME COURT OF THE UNITED STATES. 1810.

[Reported 6 Cranch, 148.]

THIS was an appeal from the decree of the Circuit Court of the United States for the District of Kentucky, in a suit in equity brought by Watts, a citizen of Virginia, against Massie, a citizen of Kentucky, to compel the latter to convey to the former 1,000 acres of land in the State of Ohio, the defendant having obtained the legal title with notice of the plaintiff's equitable title.

MARSHALL, C. J. This suit having been originally instituted, in the court of Kentucky, for the purpose of obtaining a conveyance for lands lying in the State of Ohio, an objection is made by the plaintiff in error, who was the defendant below, to the jurisdiction of the court by which the decree was rendered.

Taking into view the character of the suit in chancery brought to establish a prior title originating under the land law of Virginia against a person claiming under a senior patent, considering it as a substitute for a *caveat* introduced by the peculiar circumstances attending those titles, this court is of opinion, that there is much reason for considering it as a local action, and for confining it to the court sitting within the State in which the lands lie. Was this cause, therefore, to be considered as involving a naked question of

title, was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

In the celebrated case of *Penn v. Lord Baltimore*, the Chancellor of England decreed a specific performance of a contract respecting lands lying in North America. The objection to the jurisdiction of the court, in that case, as reported by Vezey, was not that the lands lay without the jurisdiction of the court, but that, in cases relating to boundaries between provinces, the jurisdiction was exclusively in the king and council. It is in reference to this objection, not to an objection that the lands were without his jurisdiction, that the chancellor says, "This court, therefore, has no original jurisdiction on the direct question of the original right of boundaries." The reason why it had no original jurisdiction on this direct question was, that the decision on the extent of those grants, including dominion and political power, as well as property, was exclusively reserved to the king in council.

In a subsequent part of the opinion, where he treats of the objection to the jurisdiction of the court, arising from its inability to enforce its decree *in rem*, he allows no weight to that argument. The strict primary decree of a court of equity is, he says, *in personam*, and may be enforced in all cases where the person is within its jurisdiction. In confirmation of this position he cites the practice of the courts to decree respecting lands lying in Ireland and in the colonies, if the person against whom the decree was prayed be found in England.

In the case of *Arglasse v. Muschamp*, 1 Vernon, 75, the defendant, residing in England, having fraudulently obtained a rent charge on lands lying in Ireland, a bill was brought in England to set it aside. To an objection made to the jurisdiction of the court the chancellor replied: "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you that you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local,

and so wholly elude the jurisdiction of this court." The chancellor, in that case, sustained his jurisdiction on principle, and on the authority of *Archer and Preston*, in which case a contract made respecting lands in Ireland, the title to which depended on the act of settlement, was enforced in England, although the defendant was a resident of Ireland, and had only made a casual visit to England. On a rehearing before Lord Keeper North this decree was affirmed.

In the case of *The Earl of Kildare v. Sir Morrice Eustace and Fitzgerald*, 1 Vern. 419, it was determined that if the trustee live in England, the chancellor may enforce the trust, although the lands lie in Ireland.

In the case of *Toller v. Carteret*, 2 Vern. 494, a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the court, the person of the mortgagor being within it.

Subsequent to these decisions was the case of *Penn against Lord Baltimore*, 1 Vez. 444, in which the specific performance of a contract for lands lying in North America was decreed in England.

Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.

The inquiry, therefore, will be, whether this be an unmixed question of title, or a case of fraud, trust, or contract.

The facts in this case, so far as they affect the question of jurisdiction, are, that, in 1787, the land warrant, of which Watts is now the proprietor, and which then belonged to Oneal, was placed without any special contract in the hands of Massie, as a common locator of lands. In the month of August in the same year he located 1,000 acres, part of this warrant, to adjoin a previous location made on the same day for Robert Powell.

In the year 1793 Massie, as deputy-surveyor, surveyed the lands of Thomas Massie, on which Robert Powell's entry depended, and the land of Robert Powell, on which Oneal's entry; now the property of Watts, depended. On the 27th of June, 1795, Nathaniel Massie, the plaintiff in error, entered for himself 2,366 acres of land to adjoin the surveys made for Robert Powell, Thomas Massie, and one Daniel Stull. The entry of Daniel Stull commences at the upper corner of Ferdinand Oneal's entry on the Scioto, and the entry of Ferdinand Oneal commences at the upper corner of Robert Powell's entry on the Scioto; so that the land of Oneal would be supposed, from the entries, to occupy the space on the Scioto between Powell and Stull. Nathaniel Massie's entry, which was made after surveying the lands of Thomas Massie and of Robert Powell, binds on the Scioto, and occupies the whole space between Powell's survey and Stull's survey.

In the year 1796, Nathaniel Massie surveyed 530 acres of Oneal's entry, chiefly within Stull's survey, and afterwards, in the spring of 1797, purchased Powell's survey. Nathaniel Massie's entry is surveyed and patented. In 1801 Massie received from Watts, in money, the customary compensation for making his location.

It is alleged that Nathaniel Massie has acquired for himself the land which was comprehended within Oneal's entry, and has surveyed for Oneal land to which his entry can by no construction be extended.

If this allegation be unsupported by evidence, there is an end of the case. If it be supported, had the court of Kentucky jurisdiction of the cause?

Although no express contract be made, yet it cannot be doubted that the law implies a contract between every man who transacts business for another at the request of that other and the person for whom it is transacted. A common locator who undertakes to locate lands for an absent person is bound to perform the usual duties of a locator, and is entitled to the customary compensation for those duties. If he fails in the performance of those duties, he is liable to the action of the injured party, which may be instituted wherever his person is found. If his compensation be refused, he may sue therefor in any court within whose jurisdiction the person for whom the location was made can be found. In either action the manner in which the service was performed is inevitably the subject of investigation, and the difficulty of making it cannot oust the court of its jurisdiction.

From the nature of the business and the situation of the parties, the person for whom the location is made being generally a non-resident, and almost universally unacquainted with the country in which his land is placed, it is the duty of the locator not only to locate the lands, but to show them to the surveyor. He also necessarily possesses the power to amend or to change the location if he has sufficient reason to believe that it is for the interest of his employer so to do. So far as respects the location he is substituted in the place of the owner, and his acts done *bona fide* are the acts of the owner.

If, under these circumstances, a locator finding that the entry he has made cannot be surveyed, instead of withdrawing it or amending it so as to render it susceptible of being carried into execution, secures the adjoining land for himself, and shows other land to the surveyor which the location cannot be construed to comprehend, it appears to this court to be a breach of duty, which amounts to a violation of the implied contract, and subjects him to the action of the party injured.

If the location be sustainable, and the locator, instead of showing the land really covered by the entry, shows other land, and appropriates to himself the land actually entered, this appears to the court

to be a species of *mala fides* which will, in equity, convert him into a trustee for the party originally entitled to the land.

In either case the jurisdiction of the court of the State in which the person is found is sustainable.

If we reason by analogy from the distinction between actions local and transitory at common law, this action would follow the person, because it would be founded on an implied contract, or on neglect of duty.

If we reason from those principles which are laid down in the books relative to the jurisdiction of courts of equity, the jurisdiction of the court of Kentucky is equally sustainable, because the defendant, if liable, is either liable under his contract, or as trustee.¹

WHITE v. WHITE.

COURT OF APPEALS, MARYLAND. 1835.

[Reported 7 Gill & Johnson, 208.]

BUCHANAN, C. J. The bill in this case was filed for the sale of the real estate of Abraham White, deceased, and the distribution of the proceeds among his heirs, after deducting the amount of a subsisting lien, by mortgage, on a part of it; on the ground that it will not admit of an advantageous division, and that it would be to the advantage of all the parties interested, that it should be sold, which is admitted by the answers. A tract of land, part of this estate, is stated in the bill, to lie in the State of Pennsylvania, as to which the chancellor dismissed the bill for the want of jurisdiction, and decreed a sale of that portion of the property, which lies in this State, appointing a trustee for that purpose. And the only question is, whether he should not also have decreed a sale by the trustee, of the tract of land in Pennsylvania.

It would be rather an idle thing in chancery, to entertain jurisdiction of a matter not within its reach, and make a decree which it could have no power to enforce, or to compel a compliance with. And the absence of that very power is a good test by which to try the question of jurisdiction. It would be a solecism to say, that the chancellor has jurisdiction to decree *in rem*, where the thing against

¹ *Acc. Penn v. Lord Baltimore*, 1 Ves. Sr. 444; *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117; *Cloud v. Greasley*, 125 Ill. 313, 17 N. E. 826; *Reed v. Reed*, 75 Me. 264; *Brown v. Desmond*, 100 Mass. 267; *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551; *Gardner v. Ogden*, 22 N. Y. 327; *Guerrant v. Fowler*, 1 Hen. & M. 5; *Poindexter v. Burwell*, 82 Va. 507.

So a court of equity has jurisdiction to enjoin the conveyance of foreign land: *Frank v. Peyton*, 82 Ky. 150; and to enjoin the obstruction of a foreign private way: *Alexander v. Tolleston Club*, 110 Ill. 65. — Ed.

which the decree goes, and is alone the subject of, and to be operated upon by it, is beyond the territorial jurisdiction of the Chancery Court, and not subject to its authority, and the decree, if passed, would itself be nugatory for the want of power, or jurisdiction to give it effect. Chancery can have no jurisdiction where it can give no relief. Now what jurisdiction has the Chancery Court of Maryland over lands lying in a foreign country, or in another State; and having no jurisdiction of lands so situated, what authority has it to decree a sale of them, and impart to its trustee authority to go into such State, or foreign country, to carry its decree into effect, by making sale of them.

It is true that where the decree sought is *in personam*, and may be carried into effect by process of contempt, the Court of Chancery here may have jurisdiction, although it may affect land lying in another State, the defendant being in the State of Maryland, as in a case of trust, or fraud, or of contract. As where a bill is filed against a person in this State, for the specific performance of a contract, or agreement, relating to land in another State. In such a case, the decree does not act directly upon the land, but upon the defendant here, and within the jurisdiction of the court. So where the land itself that is sought to be affected lies within the State, and the proceedings are against a person residing out of the State.

But in this case the bill seeks a sale of land in Pennsylvania, not within the jurisdiction of the Court of Chancery of Maryland; and the decree if made would not be *in personam*, but for the sale of the land, through the instrumentality of a trustee, and could not be enforced by any process from that court. It is not like the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, where the bill was for the specific performance of articles concerning the boundaries of the then provinces of Maryland and Pennsylvania, Lord Baltimore the defendant being in England, and subject to the compulsory process of chancery there. Nor like the other cases to be found in the English Chancery reports, affecting lands not lying in England, where the proceedings were *in personam*, the defendants residing there, and subject to process of contempt, etc.

*Decree affirmed with costs.*¹

¹ *Acc. Watkins v. Holman*, 16 Pet. 25; *Johnson v. Kimbro*, 8 Head, 557; *Gibson v. Burgess*, 82 Va. 650. But see *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Wood v. Warner*, 15 N. J. Eq. 81.

Similarly, a court of equity may not order the abatement of a foreign nuisance: *P. v. Central R. R.*, 42 N. Y. 283; nor grant specific performance of a contract to dig a ditch in a foreign state: *Port Royal R. R. v. Hammond*, 58 Ga. 523; nor declare a deed of foreign land void: *Carpenter v. Strange*, 141 U. S. 87; *Davis v. Headley*, 22 N. J. Eq. 115; but see *C. v. Levy*, 23 Grat. 21. — Ed.

SECTION III.

JURISDICTION QUASI IN REM.

PENNOYER v. NEFF.

SUPREME COURT OF THE UNITED STATES. 1878.

[Reported 95 United States, 714.]

FIELD, J.¹ This is an action to recover the possession of a tract of land, of the alleged value of \$15,000, situated in the State of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of September 27, 1850, usually known as the Donation Law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the State. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than \$300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the State; that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a non-resident and absent defendant who has property within the State. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, "unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein, and in the last case only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean, that in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is

¹ Arguments of counsel and part of the dissenting opinion are omitted. — Ed.

established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. *D'Arcy v. Ketchum et al.*, 11 How. 165. In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to, any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit *to the satisfaction of the court or judge*, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the "affidavit of the printer, or his foreman, or his principal clerk," is satisfied when the affidavit is made by the editor of the paper. The term "printer," in their judgment, is there used not to indicate the person who sets up the type — he does not usually have a foreman or clerks; it is rather used as synonymous with publisher. The Supreme Court of New York so held in one case, — observing that, for the purpose of making the required proof, publishers were "within the spirit of the statute." *Bunce v. Reed*, 16 Barb. (N. Y.) 350. And, following this ruling, the Supreme Court of California held that an affidavit made by a "publisher and proprietor" was sufficient. *Sharp v. Daugney*, 33 Cal. 512. The term "editor," as used when the statute of New York was passed, from which the Oregon law is borrowed, usually included not only the person who wrote or selected the articles for publication, but the person who published the paper and put it into circulation. Webster, in an early edition of his Dictionary, gives as one of the definitions of an editor, a person "who superintends the publication of a newspaper." It is principally since that time that the business of an editor has been separated from that of a publisher and printer, and has become an independent profession.

If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted

upon here, that the judgment in the State court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand of a resident creditor except by a proceeding *in rem*; that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, *Conf. Laws*, c. 2; *Wheat. Int. Law*, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists as an elementary principle that the laws of one State have no operation outside of its territory except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, *Conf. Laws*, sect. 539.

But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them,

in an attempt to give extraterritorial operation to its laws, or to enforce an extraterritorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated. *Penn v. Lord Baltimore*, 1 Ves. 444; *Massie v. Watts*, 6 Cranch, 148; *Watkins v. Holman*, 16 Pet. 25; *Corbett v. Nutt*, 10 Wall. 464.

So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate.

These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus, in *Picquet v. Swan*, 5 Mason, 35, Mr. Justice Story said:—

“Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*.”

And in *Boswell's Lessee v. Otis*, 9 How. 336, where the title of the plaintiff in ejectment was acquired on a sheriff's sale, under a money decree rendered upon publication of notice against non-residents, in a suit brought to enforce a contract relating to land, Mr. Justice McLean said:—

"Jurisdiction is acquired in one of two modes : first, as against the person of the defendant by the service of process ; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*."

These citations are not made as authoritative expositions of the law ; for the language was perhaps not essential to the decision of the cases in which it was used, but as expressions of the opinion of eminent jurists. But in *Cooper v. Reynolds*, reported in the 10th of Wallace, it was essential to the disposition of the case to declare the effect of a personal action against an absent party, without the jurisdiction of the court, not served with process or voluntarily submitting to the tribunal, when it was sought to subject his property to the payment of a demand of a resident complainant ; and in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions, and the jurisdiction of the court over them. In that case, the action was for damages for alleged false imprisonment of the plaintiff ; and upon his affidavit that the defendants had fled from the State, or had absconded or concealed themselves so that the ordinary process of law could not reach them, a writ of attachment was sued out against their property. Publication was ordered by the court, giving notice to them to appear and plead, answer or demur, or that the action would be taken as confessed and proceeded in *ex parte* as to them. Publication was had ; but they made default, and judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession of the property, the original owner brought ejectment for its recovery. In considering the character of the proceeding, the court, speaking through Mr. Justice Miller, said : —

"Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and subject his property lying within the territorial jurisdiction of the court to the payment of that demand. But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within the territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case whether he appears or not. If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes in its

essential nature a proceeding *in rem* ; the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions. First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other ; nor can it be used as evidence in any other proceeding not affecting the attached property ; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

The fact that the defendants in that case had fled from the State, or had concealed themselves, so as not to be reached by the ordinary process of the court, and were not non-residents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court ; and the grounds and extent of its authority over persons and property thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance.

The writer of the present opinion considered that some of the objections to the preliminary proceedings in the attachment suit were well taken, and therefore dissented from the judgment of the court ; but to the doctrine declared in the above citation he agreed, and he may add, that it received the approval of all the judges. It is the only doctrine consistent with proper protection to citizens of other States. If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent ; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings

authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a State to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed, that, where they have property within the State, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law. The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. In

Webster v. Reid, reported in 11th of Howard, the plaintiff claimed title to land sold under judgments recovered in suits brought in a territorial court of Iowa, upon publication of notice under a law of the territory, without service of process; and the court said:—

“These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case, there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold.”

The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several States, as attempts have been made to enforce such judgments in States other than those in which they were rendered, under the provision of the Constitution requiring that “full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;” and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, “they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are or shall be taken.” In the earlier cases, it was supposed that the act gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the State itself to exercise authority over the person or the subject-matter. *M’Elmoyle v. Cohen*, 13 Pet. 312. In the case of *D’Arcy v. Ketchum*, reported in the 11th of Howard, this view is stated with great clearness. That was an action in the Circuit Court of the United States for Louisiana, brought upon a judgment rendered in New York under a State statute, against two joint debtors, only one of whom had been served with process, the other being a non-resident of the State. The Circuit Court held the judgment conclusive and binding upon the non-resident not served with process; but this court reversed its decision, observing, that it was a familiar rule that countries foreign to our own disregarded a judgment merely against the person, where the defendant had not been served with process nor had a day in court; that national comity was never thus extended; that the proceeding was deemed an illegitimate assumption of power, and resisted as mere abuse; that no faith and credit or force and effect had been given to such judgments

by any State of the Union, so far as known; and that the State courts had uniformly, and in many instances, held them to be void. "The international law," said the court, "as it existed among the States in 1790, was, that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State when the defendant had not been served with process or voluntarily made defence; because neither the legislative jurisdiction nor that of courts of justice had binding force." And the court held that the act of Congress did not intend to declare a new rule, or to embrace judicial records of this description. As was stated in a subsequent case, the doctrine of this court is, that the act "was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result, nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another." *The Lafayette Insurance Co. v. French et al.*, 18 How. 404.

This whole subject has been very fully and learnedly considered in the recent case of *Thompson v. Whitman*, 18 Wall. 457, where all the authorities are carefully reviewed and distinguished; and the conclusion above stated is not only reaffirmed, but the doctrine is asserted, that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence. In all the cases brought in the State and Federal courts, where attempts have been made under the act of Congress to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force, except as to property, or interests in property, within the State, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits. In *Bissell v. Briggs*, decided by the Supreme Court of Massachusetts as early as 1813, the law is stated substantially in conformity with these views. In that case, the court considered at length the effect of the constitutional provision, and the act of Congress mentioned; and after stating that, in order to entitle the judgment rendered in any court of the United States to the full faith and credit

mentioned in the Constitution, the court must have had jurisdiction not only of the cause, but of the parties, it proceeded to illustrate its position by observing, that, where a debtor living in one State has goods, effects, and credits in another, his creditor living in the other State may have the property attached pursuant to its laws, and, on recovering judgment, have the property applied to its satisfaction; and that the party in whose hands the property was would be protected by the judgment in the State of the debtor against a suit for it, because the court rendering the judgment had jurisdiction to that extent; but that if the property attached were insufficient to satisfy the judgment, and the creditor should sue on that judgment in the State of the debtor, he would fail, because the defendant was not amenable to the court rendering the judgment. In other words, it was held that over the property within the State the court had jurisdiction by the attachment, but had none over his person; and that any determination of his liability, except so far as was necessary for the disposition of the property, was invalid.¹

In *Kilbourn v. Woodworth*, 5 Johns. (N. Y.) 37, an action of debt was brought in New York upon a personal judgment recovered in Massachusetts. The defendant in that judgment was not served with process; and the suit was commenced by the attachment of a bedstead belonging to the defendant, accompanied with a summons to appear, served on his wife after she had left her place in Massachusetts. The court held that the attachment bound only the property attached as a proceeding *in rem*, and that it could not bind the defendant, observing, that to bind a defendant personally, when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice, repeating the language in that respect of Chief Justice De Grey, used in the case of *Fisher v. Lane*, 3 Wils. 297, in 1772. See also *Borden v. Fitch*, 15 Johns. (N. Y.) 121, and the cases there cited, and *Harris v. Hardeman et al.*, 14 How. 334. To the same purport decisions are found in all the State courts. In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the State. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within

¹ *Acc.* *Freeman v. Alderson*, 119 U. S. 185; *McVicar v. Beedy*, 31 Me. 314; *Eliot v. McCormick*, 144 Mass. 10; *Arndt v. Arndt*, 15 Ohio, 33; *Jones v. Spencer*, 15 Wis. 583. See *Melhop v. Doane*, 31 Ia. 397.—ED.

the State where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered. *Smith v. McCutchen*, 38 Mo. 415; *Darrance v. Preston*, 18 Iowa, 396; *Hakes v. Shupe*, 27 id. 465; *Mitchell's Administrator v. Gray*, 18 Ind. 123.

Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his *Treatise on Constitutional Limitations*, 405,

for any other purpose than to subject the property of a non-resident to valid claims against him in the State, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned.

It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the State creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. *Nations et al. v. Johnson et al.*, 24 How. 195.

It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. *Bish. Marr. and Div.*, sect. 156.

Neither do we mean to assert that a State may not require a non-

resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in *Vallee v. Dumergue*, 4 Exch. 290, "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them." See also *The Lafayette Insurance Co. v. French et al.*, 18 How. 404, and *Gillespie v. Commercial Mutual Marine Insurance Co.*, 12 Gray (Mass.), 201. Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. *Copin v. Adamson*, Law Rep. 9 Ex. 345.

In the present case there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

Judgment affirmed.

HUNT, J., dissenting. I am compelled to dissent from the opinion and judgment of the court, and, deeming the question involved to be important, I take leave to record my views upon it. . . .

It is said that the case where a preliminary seizure has been made, and jurisdiction thereby conferred, differs from that where the property is seized at the end of the action, in this: In the first case, the property is supposed to be so near to its owner, that, if seizure is made of it, he will be aware of the fact, and have his opportunity to defend, and jurisdiction of the person is thus obtained. This, however, is matter of discretion and of judgment only. Such seizure is not in itself notice to the defendant, and it is not certain that he will by that means receive notice. Adopted as a means of communicating it, and although a very good means, it is not the only one, nor necessarily better than a publication of the pendency of the suit, made with an honest intention

to reach the debtor. Who shall assume to say to the legislature, that if it authorizes a particular mode of giving notice to a debtor, its action may be sustained, but if it adopts any or all others, its action is unconstitutional and void? The rule is universal, that modes, means, questions of expediency or necessity, are exclusively within the judgment of the legislature, and that the judiciary cannot review them. This has been so held in relation to a bank of the United States, to the legal-tender act, and to cases arising under other provisions of the Constitution.

In *Jarvis v. Barrett*, 14 Wis. 591, such is the holding. The court say:—

“The essential fact on which the publication is made to depend is property of the defendant in the State, and not whether it has been attached. . . . There is no magic about the writ [of attachment] which should make it the exclusive remedy. The same legislative power which devised it can devise some other, and declare that it shall have the same force and effect. The particular means to be used are always within the control of the legislature, so that the end be not beyond the scope of legislative power.”

If the legislature shall think that publication and deposit in the post-office are likely to give the notice, there seems to be nothing in the nature of things to prevent their adoption in lieu of the attachment. The point of power cannot be thus controlled.

That a State can subject land within its limits belonging to non-resident owners to debts due to its own citizens as it can legislate upon all other local matters; that it can prescribe the mode and process by which it is to be reached,—seems to me very plain.

I am not willing to declare that a sovereign State cannot subject the land within its limits to the payment of debts due to its citizens, or that the power to do so depends upon the fact whether its statute shall authorize the property to be levied upon at the commencement of the suit or at its termination. This is a matter of detail; and I am of opinion that if reasonable notice be given, with an opportunity to defend when appearance is made, the question of power will be fully satisfied.

WOODRUFF v. TAYLOR.

SUPREME COURT OF VERMONT. 1847.

[*Reported 20 Vermont, 65.*]

TRESPASS for taking certain personal property. The defendant pleaded the general issue, and also pleaded two pleas in bar; which were, in substance, that he commenced a suit against one Phelps Smith in the Court of King's Bench in the District of Montreal, in Lower Canada, and caused his process to be served by arresting the

body of Smith; that in October, 1842, he recovered judgment against Smith, in the suit for £26 15s. 9d., debt, and £56 4s. 2d., costs; that in June, 1843, he took out a writ of *fi. fa.*, upon the judgment, against the goods of Smith, and placed the same in the hands of the sheriff's bailiff for service; that on the 13th of June, 1843, the goods described in the plaintiff's declaration being in the possession of Smith at Stanbridge in Lower Canada, the defendant turned them out to the bailiff, in the presence of one Hoyle, *Recors*, and the bailiff levied on the same as the property of Smith; that, after giving public notice of the time and place of sale, at the doors of two churches, on Sunday, June 18, and by posting up notices of the sale at the doors of the churches, the bailiff, on the 26th of June, sold the property, in the presence of the said *Recors* and others, to the highest bidder for £32 1s. 3d.; that at the October Term of the Court of King's Bench the sheriff returned the *fi. fa.* into court, together with the money received thereon, excepting £8 2s. 1d. for the bailiff's costs; that then one Johnson appeared in court and claimed to be a creditor of Smith and demanded a ratable division, with the other creditors of Smith, of the money paid into court, that thereupon the court ordered the money in court to be distributed as follows, — to the crier and tipstaff £5 1s. 6d., to Taylor, the plaintiff in that suit and defendant here, £11 5s. 5d., and to Johnson £7 11s. 7d., — being the whole of the proceeds of the sale, that had been paid into court; and that the said judgment still remains in full force. And the defendant averred that during the time of all these proceedings, and until the time of pleading, there was a custom and law of the said province of Lower Canada, that the proceeds of the sale of goods so levied upon should be distributed, in manner aforesaid, among creditors appearing in court and claiming distribution, and farther, that by the custom and law of said province all persons having claim in any way or manner to the property so levied upon and sold on execution, are permitted to enter their appearance in court, when the proceeds of the sale are returned, "and if any person having such claim, neglect to enter his said appearance and make and prosecute his said claim, judgment of distribution is to be made by the court of the money so paid in, in manner and form aforesaid, and the said judgment for debt, or damages, and costs and the final distribution, as aforesaid, is conclusive, both as to the title of said goods and the amount of said damages and costs, and that the same is a bar, against all persons, to any and all actions founded upon any title, interest, claim, or possession in or to such goods." To this plea the plaintiff replied, alleging that the property in the goods was in himself, and not in Phelps Smith, and averring that, during all the period of said proceedings, he was a citizen and resident of the United States, and not a resident or citizen of Canada, nor subject to the laws of that province, and that he had no notice of such proceedings, or any of them. To this replication the defendant de-

murred. The county court adjudged the replication insufficient, and rendered judgment for the defendant. Exceptions by plaintiff.¹

HALL, J. A second argument having been directed in this case, it has perhaps assumed an importance in the eyes of counsel, which its intrinsic difficulties may not seem to warrant; but which may, nevertheless, justify a more extended opinion than would otherwise have been deemed necessary.

The question raised by the pleadings is, what is to be the effect of the proceedings in the King's Bench in Canada upon one not personally amenable to its tribunal, — when those proceedings are used here, in another and foreign jurisdiction? It is insisted, in behalf of the defendant, that the record pleaded, in connection with the custom and law of Canada set forth in the plea, is to be considered as conclusive evidence, that the matter now in controversy between the plaintiff and defendant has been adjudicated by a competent tribunal, and that therefore the plea is a good bar to the action. This renders it necessary to inquire into the nature of those proceedings, in reference to their sufficiency to constitute a record of estoppel.

Judgments, in regard to their conclusive effects as estoppels, are of two classes; — judgments *in personam* and judgments *in rem*. The judgment pleaded in this case cannot be supported as a judgment *in personam*, because the court rendering it had no jurisdiction of the person of the plaintiff, he being a citizen of another government and having no notice of the suit. As a proceeding against his person, the judgment was *coram non judice*, a mere nullity. This is too plain to need argument, and is, indeed, conceded by the counsel for the defendant, who insist that it is an estoppel as a proceeding *in rem*, — that although not binding on the person, it is binding on the property in controversy and concludes its title. A judgment *in rem* I understand to be an adjudication, pronounced upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is, in form as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself. It is binding only upon the parties appearing to be such by the record and those claiming by them. A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself, whose state, or condition, is to be determined. It is a proceeding to determine the state, or condition, of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be.

The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this State. The proceeding is, in form and

¹ Arguments of counsel are omitted. — Ed.

substance, upon the will itself. No process is issued against any one; but all persons interested in determining the state, or condition, of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money, or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the status of the subject-matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this State is concerned), just what the judgment declares it to be. This is one instance of a proceeding upon a written instrument, to determine its state, or condition; and that determination, in its consequences, involves and incidentally determines the rights of individuals to property affected by it.

But proceedings *in rem* may be and often are upon personal chattels, directly declaring the right to them. In such cases the proceeding is for the supposed violation by the property, so to speak, of some public or municipal law, or regulation, by which it is alleged the title of the former owner has become divested. The property being seized, a proceeding is then instituted against it, upon an allegation stating the cause for which it has become forfeited; upon which public notice is given, in some prescribed form, to all persons to appear and contest the allegation. It is by no means certain, that all persons having an interest in the property have actual notice of the proceeding; but if the thing itself, upon which the proceeding is had, be within the jurisdiction of the court, all persons interested are held to have constructive notice; and the sentence, or decree, of the court, declaring the state, or condition, of the property, is held to be conclusive upon all the world. A sale of the property, under such sentence, passes the right absolutely; and farther, in the case of judgments of courts of admiralty, they are also held to be conclusive evidence of the facts stated in the decree to have been found by the court, as the basis of the decree. And perhaps the judgments of municipal courts, acting *in rem*, within the sphere of their jurisdiction, would have the same effect.

These proceedings that have been mentioned are purely *in rem*. But, besides these, there is another class of cases, which may perhaps be considered, to some extent, proceedings *in rem*, though in form they are proceedings *inter partes*. An attachment of property in this State, where the court has jurisdiction of the property, but not of the person of the defendant, and a sale of it (or a levy upon it, if it be real estate), on execution, is in the nature of a proceeding *in rem*. The judgment, if the defendant have no notice, would be treated as a nullity out of our jurisdiction, so far as the person of the defendant was concerned; though it would be held binding, as between the parties, so far as regarded the property, as a pro-

ceeding *in rem*. The defendant would not, I apprehend, be allowed to recover back his property in another jurisdiction. The status of the property, as between the plaintiff and defendant, would be held to have been determined by the proceeding. But the proceeding would not in any way affect the status of the property as to any other persons than the parties to the record and those claiming by them.

Our proceeding of foreign attachment partakes, perhaps still more, of the nature of a proceeding *in rem*; but its operation as such is also of a limited character. The suit is *inter partes*, and, as a proceeding *in rem*, it must be confined to such parties. A process is issued in favor of a plaintiff, declaring against his debtor residing in another government, and alleging, also, that another person here, named in the process and styled a trustee, has goods in his hands belonging to the plaintiff's debtor, or is indebted to him, and praying that the goods or debt found here may be declared forfeited to the plaintiff, or, in other words, that the property here may be applied in payment of the plaintiff's demand. I conceive the court here has jurisdiction of the property in the hands of the trustee, or the debt due from him, — it being found in our jurisdiction, — and that the court may proceed upon it *in rem*. After publication, by which the debtor is constructively notified of the proceeding against his property, the court adjudicates upon the property and declares that it shall be delivered, or paid, to the plaintiff, to be applied upon his debt. I think such adjudication changes the status of the property, or debt, and deprives the principal debtor of all title to it; that such adjudication should be held binding and conclusive upon all the parties to the proceeding; that the foreign creditor of the trustee, having placed his property, or his credit, within this jurisdiction, should be bound by its forfeiture, declared by our courts; and that he should be barred, in any other jurisdiction, from prosecuting his claim against the trustee. But the operation of this proceeding *in rem* must be limited to the parties to it, and cannot in any manner affect the right or interest of any other person, having an independent and adverse claim to the goods, or debt, which was the subject-matter of the suit. The court does not pretend to notify such adverse claimant, either constructively, or otherwise; nor does the proceeding profess to determine the rights of any other persons than those who are parties of record to it; and it can, consequently, affect the rights of no other persons.

The distinction between proceedings purely *in rem* and those of a limited character, which have been mentioned, I think is strongly and plainly marked. The object and purpose of a proceeding purely *in rem* is to ascertain the right of every possible claimant; and it is instituted on an allegation, that the title of the former owner, whoever he may be, has become divested; and notice of the proceeding is given to the whole world to appear and make claim to it. From

the nature of the case the notice is constructive, only, as to the greater part of the world; but it is such as the law presumes will be most likely to reach the persons interested, and such as does, in point of fact, generally reach them. In the case of a seizure for the violation of our revenue laws, the substance of the libel, which states the ground on which the forfeiture is claimed, with the order of the court thereon, specifying the time and place of trial, is to be published in a newspaper, and posted up a certain number of days; and proclamation is also made in court for all persons interested to appear and contest the forfeiture. And in every court and in all countries, whose judgments are respected, notice of some kind is given. It is, indeed, as I apprehend, just as essential to the validity of a judgment *in rem*, that constructive notice, at least, should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court. *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 607.

The limited proceedings *in rem*, before mentioned, are not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit; no notice is sought to be given to any other persons; and the judgment being only as to the status of the property as between the parties of record, it is, as to all others persons, a mere nullity.

If we apply these principles to the record pleaded in bar in this case, I think it will be impossible to maintain that, as to the plaintiff Woodruff, it was a proceeding *in rem*. There was no allegation that the status of the property, levied upon as the property of Phelps Smith, or the avails of it, when paid into court, was to be adjudicated as to him, and there was no notice, actual or constructive, to him to appear and make any claim to it. The judgment was rendered in a suit *inter partes*, in which Taylor was plaintiff and Phelps Smith defendant; and though it bound the property as between them, it could affect the rights of no other person. It is precisely the case of a levy of an execution, in this State, upon personal property, as that of the judgment debtor, of which property some third person claims to be the owner. If such third person were to bring trespass against the judgment creditor for making the levy, I do not perceive why such creditor, with the same propriety as the defendant in this case, might not plead his levy and sale in bar as a proceeding *in rem*. The record in this case, indeed, shows that the levy was made in the presence of a *Recors*, which a levy in this State would not; but I apprehend the high standing or official character of the witnesses to a trespass would not purge its illegality, or bar a right of recovery.

But the record of the judgment in the King's Bench wholly fails to show that the right of the plaintiff in this suit to the property was attempted to be adjudicated; and there is no averment in the plea that it was adjudicated. The plea states, in substance, that, by the law of Canada, it would have been adjudicated if the plaintiff had appeared in the court and made claim to the property. And by the facts set forth in the plea we are given clearly to understand that it was not adjudicated, because the plaintiff did not so make his claim. It would therefore be impossible to maintain this plea, as furnishing evidence that the matter in controversy is *res adjudicata*, even if the plaintiff had had notice of the proceeding. If the plea could, under such circumstances, be sustained, even in the courts of Canada, it would not be because the matter had been adjudicated, but because the plaintiff, having neglected to have his claim adjudicated at the time and in the manner pointed out by the laws of that province, was thereby barred of any other remedy. The plea does not aver that the property of the plaintiff, being found in the possession of Phelps Smith, in Canada, might for that reason, or for any other reason, be legally levied upon and sold as the property of Smith. It in effect admits that the original levy upon the plaintiff's property was wrongful, but proceeds upon the ground that, by reason of the subsequent proceedings, the wrong cannot now be redressed. The original right of action of the plaintiff is conceded, but it is insisted that, by something arising *ex post facto*, his remedy is gone. It is not a bar to the right that is relied upon, but a bar to the redress. This ground of defence would therefore seem to rest upon a local law of the province of Canada, which affects the plaintiff's remedy only, but which, by the well-settled doctrine of the common law, can be of no avail when a remedy is sought in another jurisdiction.

But it is unnecessary to consider farther what might have been the effect of the defendant's plea, if the plaintiff, at the time, had been a resident of Canada; because it seems quite clear that it can have no effect whatever upon the cause of action of one who was, during the whole proceeding, a resident citizen of another government, not subject to the law of the province, and who had no notice of the proceeding. Story's Conf. of Laws, 487.

The result is, that the judgment of the county court is reversed, the replication is held sufficient, and the case is remanded to the county court for the trial of the issue of fact.¹

¹ *Acc. Putnam v. McDougall*, 47 Vt. 478. — Ed.

HARRIS v. BALK.

SUPREME COURT OF THE UNITED STATES. 1905.

[Reported 198 U. S. 215.]

THE facts are as follows : The plaintiff in error, Harris, was a resident of North Carolina at the time of the commencement of this action in 1896, and prior to that time was indebted to the defendant in error, Balk, also a resident of North Carolina, in the sum of \$180, for money borrowed from Balk by Harris during the year 1896, which Harris verbally promised to repay, but there was no written evidence of the obligation. During the year above mentioned one Jacob Epstein, a resident of Baltimore, in the State of Maryland, asserted that Balk was indebted to him in the sum of over \$300. In August, 1896, Harris visited Baltimore for the purpose of purchasing merchandise, and while he was in that city temporarily on August 6, 1896, Epstein caused to be issued out of a proper court in Baltimore a foreign or non-resident writ of attachment against Balk, attaching the debt due Balk from Harris, which writ the sheriff at Baltimore laid in the hands of Harris, with a summons to appear in the court at a day named. With that attachment, a writ of summons and a short declaration against Balk (as provided by the Maryland statute) were also delivered to the sheriff and by him set up at the court house door, as required by the law of Maryland. Before the return day of the attachment writ Harris left Baltimore and returned to his home in North Carolina. He did not contest the garnishee process, which was issued to garnish the debt which Harris owed Balk. After his return Harris made an affidavit on August 11, 1896, that he owed Balk \$180, and stated that the amount had been attached by Epstein of Baltimore, and by his counsel in the Maryland proceeding Harris consented therein to an order of condemnation against him as such garnishee for \$180, the amount of his debt to Balk. Judgment was thereafter entered against the garnishee and in favor of the plaintiff, Epstein, for \$180. After the entry of the garnishee judgment, condemning the \$180 in the hands of the garnishee, Harris paid the amount of the judgment to one Warren, an attorney of Epstein, residing in North Carolina. On August 11, 1896, Balk commenced an action against Harris before a justice of the peace in North Carolina, to recover the \$180 which he averred Harris owed him. The plaintiff in error, by way of answer to the suit, pleaded in bar the recovery of the Maryland judgment and his payment thereof, and contended that it was conclusive against the defendant in error in this action, because that judgment was a valid judgment in Maryland, and was therefore entitled to full faith and credit in the courts of North Carolina. This contention was not allowed by the trial court, and judgment was accordingly entered against Harris for the amount of his indebtedness to Balk, and that

judgment was affirmed by the Supreme Court of North Carolina. The ground of such judgment was that the Maryland court obtained no jurisdiction to attach or garnish the debt due from Harris to Balk, because Harris was but temporarily in the State, and the *situs* of the debt was in North Carolina.

PECKHAM, J. The State court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the Federal question is, whether it did not thereby refuse the full faith and credit to such judgment which is required by the Federal Constitution. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.

The defendant in error contends that the Maryland court obtained no jurisdiction to award the judgment of condemnation because the garnishee, although at the time in the State of Maryland, and personally served with process therein, was a non-resident of that State, only casually or temporarily within its boundaries; that the *situs* of the debt due from Harris, the garnishee, to the defendant in error herein was in North Carolina, and did not accompany Harris to Maryland; that, consequently, Harris, though within the State of Maryland, had not possession of any property of Balk, and the Maryland State court therefore obtained no jurisdiction over any property of Balk in the attachment proceedings, and the consent of Harris to the entry of the judgment was immaterial. The plaintiff in error, on the contrary, insists that, though the garnishee were but temporarily in Maryland, yet the laws of that State provide for an attachment of this nature, if the debtor, the garnishee, is found in the State and the court obtains jurisdiction over him by the service of process therein; that the judgment, condemning the debt from Harris to Balk, was a valid judgment, provided Balk could himself have sued Harris for the debt in Maryland. This, it is asserted, he could have done, and the judgment was therefore entitled to full faith and credit in the courts of North Carolina.

The cases holding that the State court obtains no jurisdiction over the garnishee if he be but temporarily within the State, proceed upon the theory that the *situs* of the debt is at the domicil either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another State, and the garnishee has no possession of any property or credit of the principal debtor in the foreign State.

We regard the contention of the plaintiff in error as the correct one. The authorities in the various State courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them.

Attachment is the creature of the local law; that is, unless there is a law of the State providing for and permitting the attachment it can-

not be levied there. If there be a law of the State providing for the attachment of the debt, then if the garnishee be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that State. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original *situs* of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the State where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the State where the writ issues. *Blackstone v. Miller*, 188 U. S. 189, 206. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the *situs* of the debt was originally. We do not see the materiality of the expression "*situs* of the debt," when used in connection with attachment proceedings. If by *situs* is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the *situs* thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign State when therein sued upon his obligation by his creditor, as he was in the State where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defence to such suit for the debtor to plead that he was only in the foreign State casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign State after personal service of process therein, just as well as by the courts of the domicile of the debtor. If the debtor leave the foreign State without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other State where the debtor might be found. In such case the *situs* is unimportant. It is not a question of possession in the foreign State, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the State where the attachment is laid. His obligation to pay to his creditor is thereby arrested and a lien created upon the debt itself. *Cahoon v. Morgan*, 38 Vt. 234, 236; *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 483. We can see no reason why the attachment should not be thus laid, provided the creditor of the garnishee could himself sue in that State and its laws permitted the attachment.

There can be no doubt that Balk, as a citizen of the State of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several States, one of which is the right to institute actions in the courts of another State. The law of Maryland provides for the attachment of credits in a case like this. See sections 8 and 10 of Article 9 of the Code of Public General Laws of Maryland, which provide that, upon the proper facts being shown (as stated in the article), the attachment may be sued out against lands, tenements, goods, and credits of the debtor. Section 10 particularly provides that "Any kind of property or *credits* belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due." Sections 11, 12, and 13 of the above-mentioned article provide the general practice for levying the attachment and the proceedings subsequent thereto. Where money or credits are attached the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee, and the judgment condemning the amount in his hands becomes a personal judgment against him. *Buschman v. Hanna*, 72 Md. 1, 5, 6. Section 34 of the same Maryland Code provides also that this judgment of condemnation against the garnishee, or payment by him of such judgment, is pleadable in bar to an action brought against him by the defendant in the attachment suit for or concerning the property or credits so condemned.

It thus appears that Balk could have sued Harris in Maryland to recover his debt, notwithstanding the temporary character of Harris' stay there; it also appears that the municipal law of Maryland permits the debtor of the principal debtor to be garnished, and therefore if the court of the State where the garnishee is found obtains jurisdiction over him, through the service of process upon him within the State, then the judgment entered was a valid judgment. See *Minor on Conflict of Laws*, section 125, where the various theories regarding the subject are stated and many of the authorities cited. He there cites many cases to prove the correctness of the theory of the validity of the judgment where the municipal law permits the debtor to be garnished, although his being within the State is but temporary. See pp. 289, 290. This is the doctrine which is also adopted in *Morgan v. Neville*, 74 Pa. St. 52, by the Supreme Court of Pennsylvania, per Agnew, J., in delivering the opinion of that court. The same principle is held in *Wyeth Hardware & Co. v. Lang*, 127 Mo. 242, 247; in *Lancashire Insurance Co. v. Corbetts*, 165 Ill. 592; and in *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 406, 407; and to the same effect is *Embree v. Hanna*, 5 Johns. (N. Y.) 101; also *Savin v. Bond*, 57 Md. 228, where the court held that the attachment was properly served upon a party in the District of Columbia while he was temporarily there; that as his debt to the appellant was payable wherever he was found, and process had been served upon

him in the District of Columbia, the Supreme Court of the District had unquestioned jurisdiction to render judgment, and the same having been paid, there was no error in granting the prayer of the appellee that such judgment was conclusive. The case in 138 N. Y. 209, *Douglass v. Insurance Co.*, is not contrary to this doctrine. The question there was not as to the temporary character of the presence of the garnishee in the State of Massachusetts, but, as the garnishee was a foreign corporation, it was held that it was not within the State of Massachusetts so as to be liable to attachment by the service upon an agent of the company within that State. The general principle laid down in *Embree v. Hanna*, 5 Johns. (N. Y.) 101, was recognized as correct. There are, as we have said, authorities to the contrary, and they cannot be reconciled.

It seems to us, however, that the principle decided in *Chicago, R. I. &c. Ry. Co. v. Sturm*, 174 U. S. 710, recognizes the jurisdiction, although in that case it appears that the presence of the garnishee was not merely a temporary one in the State where the process was served. In that case it was said: "All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." 2 Parsons on Contracts, 8th ed., 702 (9th ed., 739). The debt involved in the pending case had no 'special limitation or provision in respect to payment.' It was payable generally, and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases,—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose." The case recognizes the right of the creditor to sue in the State where the debtor may be found, even if but temporarily there, and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in the foreign State, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff, in such proceeding in the foreign State, is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign State his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the State where the attachment was sued out permits it.

It seems to us, therefore, that the judgment against Harris in Maryland, condemning the \$180 which he owed to Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the State of Maryland.

act of courts to prevent the payment of Harris, owing a debt to Balk, paid it to Epstein, he certainly ought not to have done so at that time, but should have the right to stand judgment. It is objected, however, that Epstein was not under legal compulsion to pay the debt to Balk, which was attached to him as we have seen, no defence to set up against the judgment. Jurisdiction over him personally was not. As he was absolutely without jurisdiction, why he should not consent to a judgment against him is a judgment the plaintiff was legally entitled to prevent. There was no mere technical meaning of that phrase as applicable

to negligence, and if the garnishee were negligent in not proceeding to the damage of the plaintiff to set up the judgment as a defence. It is the duty of the garnishee to give notice to his creditor, so that the creditor may have an opportunity to defend against the claim of the person suing. This is affirmed in the case above cited of *Epstein v. Balk*, and is spoken of in *Railroad Co. v. Balk*, wherein actually decided to be necessary that notice was given and defence made. While it is true that the garnishee to his own creditor may have a judgment against the garnishee (the plaintiff), we think it has no right of the garnishee to avail himself of the judgment thereunder. This notification is for the purpose of making sure that his creditor may defend the claim made against him in the action. It requires this at the hands of the garnishee, whether the defendant nor the garnishee, nor the credits attached, could not, without security, issue the writ of execution unless the defendant gave security before the court awarding the writ, and a day, appear in the action and show that some part thereof, was not due to the defendant, Balk, had notice of this attachment, and the issuing thereof and the entry of judgment against the plaintiff in error to recover his debt (Harris') return to North Carolina, in which case a judgment was set up by Harris as a plea in abatement. Therefore, had an opportunity for a year and

a day after the entry of the judgment to litigate the question of his liability in the Maryland court and to show that he did not owe the debt, or some part of it, as was claimed by Epstein. He, however, took no proceedings to that end, so far as the record shows, and the reason may be supposed to be that he could not successfully defend the claim, because he admitted in this case that he did, at the time of the attachment proceeding, owe Epstein some \$344.

Generally, though, the failure on the part of the garnishee to give proper notice to his creditor of the levying of the attachment would be such a neglect of duty on the part of the garnishee which he owed to his creditor as would prevent his availing himself of the judgment in the attachment suit as a bar to the suit of his creditor against himself, which might therefore result in his being called upon to pay the debt twice.

The judgment of the Supreme Court of North Carolina must be reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court. *Reversed.*

Mr. Justice HARLAN and Mr. Justice DAY dissented.

SECTION IV.

JURISDICTION FOR DIVORCE.

LE MESURIER v. LE MESURIER.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1895.

[*Reported [1895] Appeal Cases, 517.*]

APPEAL from the Supreme Court of Ceylon, which dismissed appellant's libel for divorce on the ground of lack of jurisdiction. At the time of the marriage (which was solemnized in England) appel-

lant, the husband, was and has since remained a resident of Ceylon, but was then and has since remained domiciled in England. The respondent was a Frenchwoman.¹

The judgment of their Lordships was delivered by LORD WATSON.

When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognized rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage.

Tollemache v. Tollemache, 1 Sw. & Tr. 557, which was decided by three judges in 1859, shortly after the passing of the Divorce Act, appears to be an authority to the contrary. The learned judges sustained the jurisdiction of the English court, which was the forum of the husband's domicile, and disregarded as incompetent a decree of the Court of Session dissolving his marriage, although he had a matrimonial domicile in Scotland, where he had *bona fide* resided for four years with his wife, neither casually nor as a traveller. Then in *Brodie v. Brodie*, 2 Sw. & Tr. 259, in the year 1861, three learned judges decided the opposite, holding that residence of that kind, which had been found in *Tollemache v. Tollemache*, to be insufficient to give jurisdiction to a Scottish court where the domicile was English, was nevertheless sufficient to give jurisdiction to themselves where the domicile was Australian. In *Wilson v. Wilson*, L. R. 2 P. & D. 435, jurisdiction was sustained by Lord Penzance upon the ground that the petitioner had acquired an English domicile, with an expression of opinion by his Lordship that such domicile ought to be the sole ground of jurisdiction to dissolve marriage. In *Niboyet v. Niboyet*, 4 P. D. 1, Sir Robert Phillimore expressed a similar opinion, and dismissed the suit of the petitioner, who had a matrimonial domicile in England which fully answered the definition of such domicile given either in *Brodie v. Brodie* or in *Pitt v. Pitt*, 1 Court Sess. Cas. 3d Series, 106, 4 Macq. App. Cas. 627. His decision was, no doubt, reversed in the Court of Appeal; but it had the support of the present Master of the Rolls, and their Lordships have already pointed out that the judgment of the majority was mainly, if not altogether, based upon a reason which will not bear scrutiny.

The Scottish decisions appear to their Lordships to be equally inefficient to show that a matrimonial domicile is a recognized ground of divorce jurisdiction. So far as they go, they are consistent enough but the doctrine appears to have had a very brief existence, because the three cases in which it was applied all occurred between the 7th of February and the 14th of December in the year 1862. Although, owing to the course taken by the appellant's counsel in *Pitt v. Pitt*, 1 Court Sess. Cas. 3d Series, 106, 4 Macq. App. Cas. 627, the House of Lords had not an opportunity of expressly

¹ This short statement of facts is substituted for that of the reporter. Arguments of counsel and part of the opinion are omitted. — Ed.

deciding the point, there can be little doubt that the approval of the course adopted by counsel, which was openly expressed by Lord Westbury, has had the effect of discrediting the doctrine in Scotland; and it is impossible to affirm that the Court of Session would now give effect to it. The eminent judge who, in 1862, was the first to give a full and clear exposition of the doctrine of matrimonial domicile, spoke of it, in the year 1882, not as a doctrine accepted in the law of Scotland, but as matter of speculation.

It is a circumstance not undeserving of notice that the learned judges, whether English or Scottish, who have expressed judicial opinions in favor of a matrimonial domicile, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any municipal law to the contrary. The reason for their abstinence is probably to be found in the circumstance that nothing could be extracted from these sources favorable to the view which they took. Their Lordships are of opinion that in deciding the present case, on appeal from a colony which is governed by the principles of the Roman-Dutch law, these authorities ought not to be overlooked.

Huber (Lib. 1, tit. 3, s. 2, *De Confl. Leg.*) states the rule of international law in these terms: "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*" That passage was cited with approbation by Lord Cranworth and Lord Westbury in *Shaw v. Gould*, L. R. 3 H. L. 72, 81. To the same effect, but in language more pointed, is the text of Rodenburg (*De Stat. Divers.* tit. 1, c. 3, s. 4), cited in the same case by Lord Westbury: "*Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quæritur, uni solummodo Judici, et quidem Domicilii, universum in illâ jus sit attributum.*" The same rule is laid down by Bar, the latest Continental writer on the theory and practice of international private law. He says (sect. 173, Gillespie's Translation, p. 382), "that in actions of divorce — unless there is some express enactment to the contrary — the judge of the domicile or nationality is the only competent judge." And he adds: "A decree of divorce, therefore, pronounced by any other judge than a judge of the domicile or nationality, is to be regarded in all other countries as inoperative."

There can, in their Lordships' opinion, be no satisfactory canon of international law, regulating jurisdiction in divorce cases, which is not capable of being enunciated with sufficient precision to ensure practical uniformity in its application. But any judicial definition of matrimonial domicile which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result. The definitions given in *Brodie v. Brodie*, 2 Sw. & Tr. 259, and in *Pitt v. Pitt*, 1 Court Sess. Cas. 8d Series, 106, 4 Macq. App. Cas. 627, appear to their Lordships to be equally

open to that objection. *Bona fide* residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicile. Residence which is "not that of a traveller" is not very definite; but nothing can be more vague than the description of residence which, not being that of a traveller, is not to be regarded as "casual." So, also, the place where it is the duty of the wife to rejoin her husband, if they happen to be living in different countries, is very indefinite. It may be her conjugal duty to return to his society although he is living as a traveller, or casually, in a country where he has no domicile. Neither the English nor the Scottish definitions, which are to be found in the decisions already referred to, give the least indication of the degree of permanence, if any, which is required in order to constitute matrimonial domicile, or afford any test by which that degree of permanence is to be ascertained. The introduction of so loose a rule into the *jus gentium* would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of international jurisprudence to prevent.

Their Lordships attach great weight to the consideration that the theory of matrimonial domicile for which the appellant contends has never been accepted in the court of last resort for England and Scotland. The matter does not rest there; because the theory is not only in direct opposition to the clear opinion expressed by Lord Westbury in *Pitt v. Pitt*, 1 Court Sess. Cas. 3d Series, 106, 4 Macq. App. Cas. 627, but appears to their Lordships to be at variance with the principles recognized by noble and learned Lords in *Dolphin v. Robins*, 7 H. L. C. 390, and in *Shaw v. Gould*, L. R. 3 H. L. 55. It is true that in these cases, and especially in *Dolphin v. Robins*, there was ground for holding that the spouses had resorted to a foreign country and a foreign tribunal in order to escape from the law and the courts of their English domicile. But in both the international principle upon which jurisdiction to dissolve a marriage depends, was considered and discussed; and the arguments addressed to their Lordships in favor of matrimonial domicile by the learned counsel for the appellant appear to them to be at variance with the weighty observations which were made by noble and learned Lords in these cases. In *Dolphin v. Robins*, Lord Cranworth stated that "it must be taken now as clearly established that the Scotch court has no power to dissolve an English marriage, where, as in this case, the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch courts, gives them jurisdiction in the matter." In *Shaw v. Gould* the dicta of noble and learned lords upon the point raised in this appeal were even more emphatic. Lords Cranworth and Westbury expressed their entire approval of the doctrine laid down by Huber and Rodenburg in those passages which have already been cited.

Their Lordships did not go the length of saying that the courts of no other country could divorce spouses who were domiciled in England; but they held that the courts of England were not bound, by any principle of international law, to recognize as effectual the decree of a foreign court divorcing spouses who, at its date, had their domicile in England. The other noble and learned lords who took part in the decision of *Shaw v. Gould*, L. R. 3 H. L. 55, were Lords Chelmsford and Colonsay. Lord Chelmsford did not express any opinion upon the subject of matrimonial domicile. Lord Colonsay rested his judgment upon the fact that the spouses had resorted to Scotland for the very purpose of committing a fraud upon the law of their English domicile; but he did indicate an opinion that, in the absence of such fraudulent purpose, they might possibly have obtained a divorce in Scotland, after a residence in that country which was insufficient to change their domicile of succession.

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson v. Wilson*, L. R. 2 P. & D. 442, which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce: "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

Their Lordships will, therefore, humbly advise Her Majesty to affirm the order appealed from. The appellant must pay to the first and fourth respondents their costs of this appeal.¹

¹ The doctrine that jurisdiction for divorce depends solely upon the domicile of the husband is now fully established in England. *Shaw v. Att.-Gen.*, L. R. 2 P. & D. 156; *Green v. Green*, [1893] P. 89. *Acc. Humphrey v. Humphrey*, 33 Scot. L. R. 99. — Ed.

ARMYTAGE v. ARMYTAGE.

HIGH COURT OF JUSTICE, PROBATE DIVISION. 1898.

[Reported [1898] *Probate*, 178.]

GORELL BARNES, J.¹ This is a suit for judicial separation by Mrs. Armytage against her husband on the ground of his alleged cruelty towards her. By his answer the respondent has denied the alleged cruelty, and by an act on petition he has further pleaded that the court has no jurisdiction to entertain the suit. I have, therefore, to determine a question of fact, whether there has been cruelty by the respondent to the petitioner, and a question of law, whether the court has jurisdiction in the circumstances to entertain the suit. The second question raises a point of considerable importance in private international law.

The parties were married at Toorak, near Melbourne, Australia, on April 11, 1888, and there are two children of the marriage, whose custody the petitioner seeks to obtain. The respondent is by birth an Australian, and his domicile is in the colony of Victoria. He was educated at Cambridge, and has been called to the English Bar. The petitioner is an Englishwoman, born in England, of parents residing at Blackheath, near London. The respondent and the petitioner became acquainted on board ship on the passage from this country to Melbourne, and their marriage was celebrated shortly afterwards. They cohabited in Australia and in England, and afterwards in Italy, and the occurrences which give rise to this suit took place at Florence in April and May, 1897. . . .

The further facts necessary to refer to are these: The petitioner came to this country with her children on or about May 25, 1897, and she and the children have since resided under her parents' roof and at Bexhill. The respondent's solicitor on May 31, 1897, wrote on behalf of the respondent to the petitioner and her father requesting the petitioner to return with the children to her husband, but she declined to comply with this request. At the end of June, 1897, the respondent came to, and has since resided in, England, but I understand he has not taken up a permanent residence here, and has only come to and is remaining in England for the purpose of enforcing, and so long as may be necessary to determine, such rights as he may have against the petitioner with regard to the children. In the month of November, 1897, he settled the sum of £100 on each of his children, and made them wards of Court in Chancery. He thereupon applied to North, J., for an order for the custody of the children, which was met by a cross-application on the part of the petitioner. In the meantime these proceedings were commenced, and the respondent was served with the citation and petition in this country. North, J., ordered the application

¹ Part of the opinion is omitted. — Ed.

before him to stand over until after the determination of this suit. The question to be decided, therefore, is whether or not this court can entertain a suit for judicial separation by the petitioner against the respondent in the circumstances above stated. . . .

The court does not now pronounce a decree of dissolution where the parties are not domiciled in this country, except in favor of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who, up to the time when she was deserted or began so to be, was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such circumstances a wife may acquire a domicile of her own in the country of the matrimonial home, it is considered that, in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country. The jurisdiction to dissolve marriages was conferred upon this court by the Matrimonial Causes Act, 1857, and although that act does not expressly make domicile a test of jurisdiction, that test is applied by the court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law, an adherence to which is necessary, as Lord Penzance said in *Wilson v. Wilson*, L. R. 2 P. & M. 435, at p. 442, in order to "preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another." These principles are expounded by many jurists in this and other countries. They are based on the principle that a person's status ought to depend on the law of his domicile, though there may be limitations and exceptions to this principle: see Dicey's *Conflict of Laws*, 1896, cap. 18, p. 474, *et seq.* (conf. Savigny, s. 362, Guthrie's translation, 2d ed. p. 148).

The jurisdiction in suits other than suits for dissolution of marriage is conferred on the court by the 6th section of the act aforesaid. By other sections judicial separation is substituted for the old divorce *a mensa et thoro*, and a new ground for separation, namely, desertion without cause for two years and upwards, is added. Sect. 22 provides as follows: "In all suits and proceedings other than proceedings to dissolve any marriage, the said court shall proceed, and act, and give relief on principles and rules which, in the opinion of the said court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this act." There are no special provisions of the act or rules or orders which directly affect the present question. The present suit is for judicial separation on the ground of cruelty. Before the act it would have been a suit for divorce *a mensa et thoro* on the same ground, and the inquiry is as to the principles and rules on which the Ecclesiastical Courts would have acted in the circumstances. The petitioner main-

tains that the test of domicile is not applicable as in a suit for dissolution of marriage, and that the Ecclesiastical Courts would have given her relief where she and her husband are both residing in England in the circumstances proved, whereas the respondent maintains that no relief would have been given because the parties are not domiciled in England, and no act of cruelty has been proved within the jurisdiction. . . .

Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles upon which the dissolubility or indissolubility of marriage depends, but there is little to be found in the works of such writers on the question of jurisdiction to decree the separation or divorce *a mensa et thoro* of married persons who are residing but not domiciled in the country of the forum. The reasons are not far to seek. Dissolution of marriage has been permitted in some States and not in others, and has been allowed in some States on grounds different from those on which it could be obtained in others. There has been want of unanimity as to the forum which ought to take cognizance of the question of divorce, and as to the laws to be applied and the recognition to be accorded in one State to a decree of dissolution of marriage pronounced in another. Persons domiciled in a country where divorce has not been permitted, or only permitted on certain grounds, have, in order to obtain divorces, temporarily resided or assumed domicile in another country where divorce has been permitted or more easily obtained than in the former country. Hence numerous difficult and varied questions have arisen and been discussed in reported cases and by different jurists upon the question of dissolution of marriage. But in practice suits for judicial separation or divorce *a mensa et thoro* and restitution of conjugal rights do not appear to have given rise to similar difficulties, and, therefore, cases and discussions as to jurisdiction in these suits are not often met with. Such suits generally occur before the tribunals of the country in which the parties are in fact domiciled, and a case like that before me was not so likely to occur in former days as at the present time, when large numbers of people are to be found residing for more or less lengthy periods away from the place of their domicile.¹ . . .

I conclude from the writers to whom I have referred that most of them are disposed to consider that the courts of the country in which the parties are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party.

Lord Hannen may possibly have had such a case in his mind when, in giving judgment in *Firebrace v. Firebrace*, (1878) 4 P. D. 63, he said, "The domicile of the wife is that of the husband, and her remedy for matrimonial wrongs must be usually sought in the place of that

¹ The learned judge here cited and examined 4 Phil. Int. L. 382; Burge, *Colon. Laws*, 668; Bishop, *Mar. & Div.* s. 158; Guthrie's *Bar's Priv. Internat. Law*, 381; Westlake, *Priv. Internat. Law*, s. 47; Fraser, *Husb. & Wife*, 1294; Wharton, *Conf. Laws*, s. 210. — ED.

domicile ;" but added : " It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident, though not domiciled." 4 P. D. at p. 67. That was a suit for restitution of conjugal rights where the respondent, the husband, who was domiciled in Australia, had left England before the institution of the suit, and it was held that the court had not jurisdiction over him after he left this country, and that the suit could not be maintained. Had he remained in England it would seem from the cases of *Newton v. Newton*, (1885) 11 P. D. 11, and *Thornton v. Thornton*, (1886) 11 P. D. 176, that the suit could have been maintained. In the recent case of *Christian v. Christian*, (1897) 78 L. T. 86, the President said that a suit for judicial separation may be founded upon matrimonial residence only as distinguished by our law from domicile.

Having considered sufficiently for the purposes of the case the opinions of the jurists above mentioned, it is necessary that I should revert to the 22d section of the Act of 1857, which requires the court in such a suit as the present to act conformably to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief.

There are several works which deal more particularly with the jurisdiction and mode of proceeding in the Ecclesiastical Courts — e. g., Burn's Ecclesiastical Law, ed. 1842, Rogers's Ecclesiastical Law, ed. 1849, Shelford's Law of Marriage and Divorce, ed. 1841, and older works, such as Godolphin's Abridgment; but I cannot trace in them any statement upon the precise point in question, and the principles to govern it must be deduced from the general principles and practice of the courts. These are stated in general terms so far as concerns the matter under consideration by James, L. J., in his judgment above referred to, see *Niboyet v. Niboyet*, 4 P. D. 1 at p. 3, where the jurisdiction of the Court Christian is considered, and it is pointed out that the Church and its jurisdiction had nothing to do with the original nationality or acquired domicile of the parties, that residence as distinct from casual presence on a visit or *in itinere* was an important element, but that residence had no connection with or little analogy to the question of a person's domicile.

In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an Ecclesiastical Court, that court would have interfered, if the parties were within the jurisdiction at the commencement of the suit, to protect the injured party against the other party in respect of the adultery or cruelty of the latter, and I can find no authority for the suggestion made by the respondent's counsel that such interference would be limited to cases where the offence complained of was committed within the jurisdiction. In *Warrender v. Warrender*, (1835) 2 Cl. & F. 488, at p. 562, Lord Lyndhurst said : " The law, either in this country or in Scotland, makes no distinction in respect of the place of the commission of the offence." Although the Ecclesiastical Courts could not extinguish the mutual obligations of

husband and wife, they, acting *pro salute animæ*, suspended these obligations in order to protect and relieve the injured party. It could make no difference, where the parties were residing within the jurisdiction, that the necessity for protection and relief arose in consequence of adultery committed by the wrong-doer while temporarily outside the jurisdiction, or of cruelty committed while the parties were temporarily outside the jurisdiction, and the apprehension of further acts of cruelty remained. If the parties were within the jurisdiction, and the necessities of the case demanded that one of them should be protected against a matrimonial wrong done by the other of which the courts would take cognizance, I cannot doubt that the courts would have interfered. The case of *Manning v. Manning*, (1871) L. R. 2 P. & M. 223, which was relied upon by the respondent's counsel, is no authority against this view, because in that case the respondent was not within the jurisdiction of the court, and the petitioner was held not to be a *bona fide* resident in England. If the respondent's contention be correct no decree of judicial separation could be made, even in cases like *Niboyet v. Niboyet*, 4 P. D. 1, where the parties, though not domiciled, were resident for years in this country.

Then, does the present case fall within the principles and rules upon which the courts have acted? I think it does. The wife, an Englishwoman, whose domicile of origin was English, and who has resided at times in England with her husband, is forced, by the cruelty committed in Italy by her husband, a domiciled Australian, to seek the protection of her parents in England. Though legally domiciled in Australia, as a matter of fact she has been forced to separate herself from her husband and establish herself in a home of her own in this country. She and her husband are both within the jurisdiction. She has been required to return with her children to her husband, and is afraid to do so owing to her apprehension of a repetition of the acts of cruelty which have been committed against her while they were living together abroad. It is against the repetition of apprehended acts of cruelty that the court grants its protection, and, unless the court interferes, there is nothing to prevent the husband from forcing himself upon his wife and placing her in a position in which she may be subjected to further acts of cruelty. The status of married persons within the country is recognized. Performance of the duties arising from the marriage tie should be required, and protection afforded against an abuse of the position resulting from that tie where necessary. Police protection is an inadequate remedy.

It may be objected that a decree of judicial separation affects the status of the parties, and that a change of status ought on principle only to be effected by the courts of the domicile. But the relief is to be given on principles and rules which, in the opinion of the court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts gave relief. According to those principles and rules cruelty and adultery were grounds for a sentence of

divorce *a mensa et thoro* which did not dissolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties. The sentence commonly separated the parties until they should be reconciled to each other. The relation of marriage still subsisted, and the wife remained a feme covert. A woman divorced by the court *a mensa et thoro* and living separate and apart from her husband could not be sued as a feme sole (see *Lewis v. Lee*, 1824, 3 B. & C. 291). The effect of the sentence was to leave the legal status of the parties unchanged. Although a sentence of judicial separation is to have the effect of a divorce *a mensa et thoro* under the old law (s. 16 of the Act of 1857), and also the further effect of placing the wife in the position of a feme sole, with respect to property which she may acquire, or which may come to or devolve upon her, from the date of the sentence and whilst the separation continues, and also for the purposes of contract and wrongs and injuries and suing and being sued during that period (ss. 25 and 26 of the Act of 1857); yet as the relief to be given now is to be given according to the principles and rules in force in the Ecclesiastical Courts, I am of opinion that the effect of the said ss. 25 and 26, if they affect a wife's status within the meaning of the term as applied to the principles under consideration, which is doubtful, is not to deprive the court of the power to grant relief in cases where it would have been granted by the Ecclesiastical Courts.

It may be further objected that, as domicile is considered a test of jurisdiction in cases of dissolution of marriage, in order that the decree may be recognized in countries other than that of the domicile, for the same reason a similar test should be applied in cases of judicial separation. But the reasons which apply in the one case are not applicable to the other; and even if the principle should be established that the courts of the country of the domicile of the parties are the only courts which can pronounce a decree of judicial separation which ought to be recognized in other countries, in my opinion, no valid reason can be urged against the courts of a country, in which a husband and wife are actually living, pronouncing a decree which will protect the one against the other so long as they remain within the jurisdiction.

In the present case the wife's domicile is legally in Australia, but, as a matter of fact, she has justifiably separated herself from her husband and made her home in England, and it is in England that she now requires protection. He has come here and subjected himself to the jurisdiction of the courts of this country. Could anything be more unreasonable than for this court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country, and leave her to proceed in the courts in Australia to protect herself against her husband in England? It may, I think, be safely laid down that the Ecclesiastical Courts would formerly, and this court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such

this court has jurisdiction to enter a decree of judicial separation in favor of the wife. It is held that the court has jurisdiction to grant a divorce. It follows that the court has jurisdiction to grant a divorce upon it by the 85th section of the Matrimonial Causes Act, 1857. The custody of the children of the marriage; it is probably more convenient that I should leave it for further contest in the court than leave it for further contest in the court to hear any application relating to the

[Rhode Island, 87.]

The principle of general law upon this subject is that a court of equity in a foreign country have no jurisdiction over a person who has no domicile within its territory; and that the parties be temporarily resident within the jurisdiction of the court, or whether the defendant be a resident of the court. This necessarily results in the State to determine the status of its citizens, without interference by foreign courts, which they have no concern. Bishop on Marriage, 721, 2d ed. and cases cited. We find the same principle given by the Supreme Court of the United States in the well-considered case of Hanover, 10 Pet. 242, which both this rule, and the reason for it, are comprehended the question before them. The kind of praise which cannot, with any propriety, be given to many American cases upon this subject. . . .

The case at bar, and for the decision of the court is said by the Supreme Court of the United States, 2 Gray, 867, to have pronounced upon general principles of law, that the jurisdiction of the petitioning party in this court to grant a divorce a vinculo is not to the marriage to be dissolved has been personally served with process only is given. — En.

with notice of the petition within the State, or appeared and answered to the petition, upon constructive notice, or upon being served with personal notice of it, out of the State? In other words, the question is, whether, as a matter of general law, a valid decree of divorce *a vinculo* can be passed in favor of a domiciled citizen of the State, upon mere constructive notice to the foreign or non-resident party to the marriage, against whom, or to dissolve whose marital rights over or upon the petitioner, the aid of the court is invoked? . . .

It is undoubtedly true, as a common-law principle, applicable to the judgments of its courts, that they bind only parties to them, or persons in such relation to the parties and to the subject of the judgment, as to be deemed privies to it. The rule of this system of jurisprudence, which brings privies within the operation of the notice served upon the principals to a judgment and binds them by its effects, is founded upon quite as clear a policy, and is sanctioned by quite as complete justice, as that which renders the judgment obligatory upon those whom they represent. It is founded upon the great policy *ut sit finis litum*, and upon the necessity, to carry out this policy, that the future and contingent representatives of the parties in relation to the subject of the judgment should be bound by it. Again, there is no system of jurisprudence, which, founded as the jurisdiction of the court is upon the personal service of the subpoena, is more special in its requisition that all parties interested should be served in the suit, in order to be bound by the decree, than that administered by the English chancery; yet even in this court, from the same policy, and upon the same necessity, the first tenant in tail, or the first person entitled to the inheritance, if there be no tenant in tail living, or even the tenant for life, as the only representative to be found of the whole inheritance, by his appearance to the suit binds to the decree in it all those subsequently and contingently interested in the estate; the court, in administering this rule of representation of parties, taking care only that the representative be one whose interest in the subject of the suit is such as to insure his giving a fair trial to the question in contestation, the decision of which is to affect those who remotely or contingently take after him. Again, there is the large class of proceedings *in rem*, or *quasi in rem*, known especially to courts administering public or general law, and borrowed from thence into every system of jurisprudence in which, the jurisdiction being founded upon the possession of the thing, the decree binds all interested in it, whether within or without the jurisdiction of the nation setting up the court, and whether personally or constructively notified of the institution or currency of the proceeding. This, too, is founded upon a necessity or high expediency, since, without it, a prize or instance court, for example, could not, so scattered or concealed are the parties interested, perform any of the functions for which, by the general or public law, it is set up. Proceedings of this nature must, we think,

be familiar to the courts of Massachusetts; and probably not a day passes in which things within their jurisdiction are not, by direct attachment or garnishee process, seized, attached, condemned, and sold under their judgments, without other than constructive notice to the non-resident owners of them, in order that these courts may do justice to their own citizens, or even to alien friends, properly applying to them for relief. Here, too, necessity requires the courts to dispense with personal notice, in order to give effect to their judicial orders; since otherwise, the State might be full of the property of non-residents and aliens, applicable to all purposes except the commanding ones of justice. Without doubt, in these and other like cases, the general law in dispensing with personal notice from necessity, requires some fair approximation to it, by representation, substitution, or at least such publicity, as under the circumstances, is proper and possible, or the proceeding will be regarded as a fraud upon the rights of the absent and unprotected, — a robbery under the forms of law, and so a fraud upon law itself. It is, however, a very narrow view of the general law, it is to form a very low estimate of the wisdom which directs its administration, to suppose, that when it can do justice to those within its jurisdiction and entitled to its aid only by dispensing with personal notice to those out of it, and substituting instead what is possible for notice to them, it is powerless to do this, and so, powerless to help its own citizens or strangers within its gates, however strong may be their claims or their necessities. Such a sacrifice of substance to shadows, of the purposes to the forms of justice, might mark the ordinances of a petty municipality, but could hardly be supposed to characterize the system of general law.

Now, marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than "fatherhood" or "sonship" is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which it resembles in this, that it is formed by contract. To this relation there are two parties, as to the others, two or more, interested without doubt in the existence of the relation, and so interested in its dissolution. These parties are placed by the relation in a certain relative state or condition, under the law, as are parents and children, masters and servants; and as every nation and State has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the person domiciled within that territory. It may, except so far as checked by constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties, or abrogate them, and so the legal obligation of the

relation which involves them, altogether. This it may do, with the exception above stated, as in some relations, by law, when it wills; declaring that the legal relation, of master and slave, for instance, shall cease to exist within its jurisdiction, or for what causes or breaches of duty in the relation, this, or the legal relation of husband and wife, or of parent and child, may be restricted in their rights and duties or altogether dissolved through the judicial intervention of its courts. The right to govern and control persons and things within the State, supposes the right, in a just and proper manner, to fix or alter the status of the one, and to regulate and control the disposition of the other; nor is this sovereign power over persons and things lawfully domiciled and placed within the jurisdiction of the State diminished by the fact that there are other parties interested through some relation, in the status of these persons, or by some claim or right, in those things, who is out of the jurisdiction, and cannot be reached by its process. No one doubts this, as a matter of general law, with regard to the other domestic relations, and what special reason is there to doubt it, as to the relation of husband and wife? The slave who flees from Virginia to Canada, — no treaty obliging his restoration — or who is brought by his master thence to a free State of the Union — no constitutional provision enforcing his return — finds his status before the law in the new jurisdiction he has entered changed at once; and no one dreams that this result of a new domicile and the new laws of it, is less legally certain and proper as a matter of general law, because the master is out of the new jurisdiction of his slave, and is not, or cannot be cited to appear and attend to some formal ceremony of emancipation. It is true that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race, and, as a relation, is nowhere so restrictive and so binding in its obligations as amongst the most truly civilized portions of it. Yet each nation and state has its peculiar law and policy as to the mode of forming, and the mode and causes for judicially dissolving this last relation, according to its right; and all that other States or nations, under the general law which pervades all Christendom can properly demand is, that in the exercise of its clear right in this last respect as to its own citizens and subjects, it should pay all, and no more attention, than is practicable to the competing rights and interests of their citizens and subjects. It should give the non-residents and foreigners, parties to such a relation of general legal sanctity as to persons of the like description interested in property within its territory, the rights to which are also everywhere recognized, at least such notice by publicity before it proceeds to judicial action, as can, under such circumstances, be given consistently with any judicial action at all efficient for the purposes of justice. To say that the general law inexorably demands personal notice in order to such action, or, still worse, demands that all parties interested in a relation or in property subject to a jurisdiction should be physically within that jurisdiction, is to lay

down a rule of law incapable of execution, or to make the execution of laws dependent not upon the claims of justice, but upon the chance locality, or, what is worse, upon the will of those most interested to defeat it.

It is evident, upon examining the statutes of the different States of the Union, that legislation vesting jurisdiction for divorce in their courts has followed no principle of general law in this respect whatsoever; some statutes making the jurisdiction, or supposing it to depend upon the place of the contract, some upon the place of the *delictum*, and some, as in this State, and as they should do, upon the domicile of the wronged and petitioning party. The courts of each State exercise, as they must, jurisdiction upon the principles laid down for them by statute; and have very little occasion, unless called upon to review the decree of some neighboring State, to attend to or consider any general principles pertaining to the subject. Engaged in this latter task, they are very apt to confound the statute principles of jurisdiction, to which they are accustomed, with the principles of general law relating to it; notwithstanding the latter so obviously grow out of the right of every State to regulate, in some cases by law, and in others by proper judicial action, according to the nature of the subject, the social condition or status, as it is called, of all persons subject to its jurisdiction. A singular instance of forgetfulness of this principle of "State sovereignty" is afforded by the case of *Hull v. Hull*, 2 Strobhart's Equity Appeals, 174; in which the right of the State of Connecticut to dissolve through its courts under the law of that State, a marriage there formed between two of its own citizens, upon the petition of a wife whose husband had deserted her and her children and settled in South Carolina, constructive notice only having been given to the absent and absconding husband, was put upon the ground that dissolution of the contract of marriage upon such notice was part of the law of the place of the contract and so part of the contract itself. The courts of that State, it seems, whilst forgetting the State rights of their northern sister, strenuously insist upon the rights of their own; holding, according to the exploded notion of *Lolley's Case*, or rather of *McCarthy v. McCarthy*, that a South Carolina marriage cannot be dissolved out of the State of South Carolina, although any other may. In *Irby v. Wilson*, 1 Dev. & Bat. Eq. R. 568, 576, under similar circumstances, except that in this case the wife was the deserting, and the husband the petitioning party, the Supreme Court of North Carolina held that a Tennessee divorce was void, upon the ground hinted at in *Lyon v. Lyon*, sup., to wit, that such a proceeding being between parties, and the wife having been constructively notified only, although such notice was all that was possible, the courts of Tennessee could not alter by way of redress the status of one of its own citizens become burdensome to him by the alleged causeless and continued desertion of his wife. Upon the same principle, and for the same reason, of course, North Carolina could not relieve from the relation its citizen, the wife, although her husband might have com-

pelled her to flee from him to the only home open to her in that State, by the grossest violation of the duties which their relation to each other imposed; and thus, both these conterminous sovereignties would be powerless for justice, over and upon the call of its respective domiciled inhabitant. In Pennsylvania, the jurisdiction is made to depend upon jurisdiction over the offender at the time of the offence (*Dorsey v. Dorsey*, 7 Watts, 349), as if the *lex loci delicti* were to govern; in Louisiana, upon like jurisdiction, unless the marriage were contracted within the State, when, we suppose, the *delictum* would be regarded as a breach of contract, if such by the law of Louisiana in which the contract was entered into. *Edward v. Green*, 9 La. Ann. R. 317. Thus, we perceive, that by some courts marriage is treated as a species of continuing executory contract between the parties, the obligations of which, and the causes and even modes of dissolving which, are fixed by the law of the place of contract. So sacredly local is it, in the view of some, that it cannot be dissolved but by the courts of the country in which it was formed. Others, perceiving, that though a contract, it is one universally recognized, acknowledged the right of foreign tribunals to act upon it, provided that in doing so, they govern themselves not by the only law which they, it may be by statute, can administer, but ascertain whether it has been broken, and so ought to be dissolved, by the law of the place of the contract. Some treat breaches of the contract of every degree as *quasi* crimes, to be punished only in the place in which they were committed, provided the parties be then there domiciled; and others, again, qualify this by an exception in favor of the tribunals of the place of contract; since there the *delicta* can be treated as breaches of the contract, if such be the law of the place of contract. If marriage be a contract, or the breach of it a tort, it may well be asked, why are they not at least personal in their nature, and transitory in their legal character? passing with the wronged person wherever he or she passes, for redress by any tribunal of the civilized world, which can obtain jurisdiction of the person of the covenant breaker or trespasser?

It is evident that from such confusion of decisions and reasons, no general principle worth considering can, by any process, be eliminated. Raising ourselves above this mist of misapplied learning and ingenuity, and looking at the matter simply as it is, it is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized State, and certainly every State in this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister, States; that a State cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens. by the fact that the subjects and citizens of other States, as related to them,

are interested in that status, and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether *a mensa et thoro* or *a vinculo matrimonii*, the general law does not deprive a State of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners, or domiciled inhabitants of other States have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions; the purpose of such notice being to banish the idea of secrecy and fraud in the proceeding by inviting publicity to it, as well as to give to persons out of the jurisdiction of the court every chance possible, under the circumstances, of appearing to the proceeding, and defending, if they will, their own rights and interests involved in it.

These views are supported by the practice of the States of Connecticut and Tennessee called in question, as we have seen by the courts of South and North Carolina, as probably by the practice of many other States, and certainly by the long continued practice of our own. They are sanctioned by the well-considered decision of *Harding v. Alden*, 9 Greenl. R. 140, and by that learned jurisconsult, the late Chancellor Kent, in his note on that case, 2 Kent's Com., 110, n. b, 4th ed. They are otherwise best sustained by authority. *Tolen v. Tolen*, 2 Blackf. 407. *Guembell v. Guembell*, Wright, 286. *Cooper v. Cooper*, 7 Ohio, 238. *Mansfield v. McIntyre*, 10 ib. 27. *Harrison v. Harrison*, 19 Alabama, 499. *Hare v. Hare*, 10 Texas, 355. See also the whole subject discussed in Bishop on Marriage and Divorce, *passim*, and especially in ch. 34 of that valuable work.

It may be added, that the distressing consequences which otherwise might arise from the conflict of laws and decisions upon this interesting and important subject has been wisely provided against by a clause of the Constitution of the United States, and can find a remedy under it in the Supreme Court of the United States, as the court of last resort, in cases demanding its application. By art. 4, sect. 1, of the Constitution of the United States, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." As this has been construed by the highest authority to give in every other State the same effect to a judgment or decree of a State court that it has in that in which it is rendered or passed, no serious injury can be done to the proper subjects of our judicial administration by the errors and mistakes of other courts with regard to our

jurisdiction. From the nature of the topics constantly agitated before it, no court in the world is better qualified to deal with questions of general law, and especially with one involving, as that before us does, the rights of a State of the Union; and under the trained qualifications of the members of the court, as well as the constitutional power of the court itself, those properly subject to our judgments and decrees in this respect, as in all others, are quite safe, having honestly obtained them, in acting by virtue of them.¹ . . .

We reserved this case, the first on the circuit which presented the question before discussed for consideration, it being admitted that the husband of the petitioner had never resided with her in this State, or even as the proof showed, been within its borders, and was now abroad in parts unknown, and was not, of course, personally served, because under such circumstances he could not be personally served with the ordinary citation issued by us to a resident defendant to such a petition. Under the authorized rule of this court, in regard to constructive notice to an absent defendant to a petition for divorce, upon affidavit of the facts, six weeks' notice of the pendency of this petition was given, by publishing the same for the space of six weeks next before the sitting of the court at this term; and it is evident that the husband of this lady knows, as from his conduct it is apparent that he cares, nothing about this proceeding. Whatever was the former domicile of the petitioner, we are satisfied that she is, and has, for upwards of the last three years, been a domiciled citizen of Rhode Island, — her only home, in the house of her father; and that, as such citizen, and upon such notice, we have power and jurisdiction over her case, and to change her condition from that of a married to that of a single woman, granting to her the relief, which, under like circumstances, the law and policy of Rhode Island accords to all its citizens. Let a decree be entered divorcing Mary Ann Ditson from George L. Ditson, and annulling the bond of matrimony now subsisting between them; and that the name of the said Mary Ann Ditson be changed to, and she be hereafter known and called by the name of Mary Ann Simmons, according to the prayer of her petition.²

¹ Here follows a discussion of the question of domicile, for which see *s. c. supra*, p. 205. — Ed.

² *Acc.* Cheever v. Wilson, 9 Wall. 108; Hanberry v. Hanberry, 29 Ala. 719; Chapman v. Chapman, 129 Ill. 386; Harden v. Alden, 9 Me. 140; Shreck v. Shreck, 32 Tex. 578; Hubbell v. Hubbell, 3 Wis. 662; Stevens v. Fisk (Can.), 8 L. N. 42. See Rhyma v. Rhyma, 7 Bush. 316; Harteau v. Harteau, 14 Pick. 81; Frary v. Frary, 10 N. H. 61.

In Massachusetts the court at the domicile of either spouse is competent, at the election of the libellant. Sewall v. Sewall, 122 Mass. 156; Watkins v. Watkins, 135 Mass. 83. In Pennsylvania the court of the libellee's domicile alone is competent, unless the libellee has changed his domicile since cause for divorce given. Colvin v. Reed, 55 Pa. 375; Reel v. Elder, 62 Pa. 308. In several States, the court of the libellant's domicile alone is competent: Irby v. Wilson, 1 Dev. & B. Eq. 568; White v. White, 18 B. L. 292, 27 Atl. 506; Dutcher v. Dutcher, 39 Wis. 651. — Ed.

STATE v. ARMINGTON.

SUPREME COURT OF MINNESOTA. 1878.

[Reported 25 Minnesota, 29.]

THE defendant was tried in a district court for the crime of polygamy. He offered in evidence a certified copy of a decree of divorce between himself and his former wife, granted by a Probate Court in Utah. This was excluded by the court on the ground that both parties were at that time resident in Minnesota; the defendant excepted. The defendant was convicted and sentenced to the state prison for two years, and appealed.¹

CORNELL, J. The remaining question for consideration relates to the decision of the court excluding what purports to be an authenticated copy of a decree of divorce of the "probate court in and for Box Elder county, in the territory of Utah," entered in that court at a special term, on December 18, 1876, in an action between John L. Armington, plaintiff, v. Martha F. Armington; defendant, dissolving the marriage contract between them. Among the objections made to this evidence, was the one that, at the time the decree purports to have been rendered both parties thereto were residents of this State, and had been for several years prior. When this evidence was offered, it incontestably appeared, from the testimony already given, that both the defendant and his said wife, Mrs. Martha F. Armington, had been resident citizens of this State, and domiciled therein, for over nine years prior to the date of the decree, and that they were both actually living in this State at the time of its entry. It did not appear, nor was any offer made to show the fact, that either had ever been domiciled, even temporarily, within the territory of Utah; and as to Mrs. Armington, it is quite clear that she never, at any time during the progress of the proceedings in said court, was outside the limits of this State, or within the territorial limits of Utah. As to Mr. Armington, the most that can be claimed from the evidence is that he temporarily left his residence in Northfield, in this State, sometime in the summer of 1876, and returned in August or September of that year. Where he was, during this period, does not affirmatively appear; but it does affirmatively appear that he has resided and practised medicine in Northfield ever since November in that year. Upon this evidence, the court was warranted in assuming that neither of the parties ever acquired a *bona fide* domicile or residence in Utah, and that both were, during the conduct of these divorce proceedings, domiciled residents of this State, and subject to its laws. Upon this state of facts, the probate court of Utah, whatever may have been the extent of its jurisdiction over the subject of divorce under the local laws of that territory as respects its citizens, had no

¹ This short statement of the facts necessary for the question of jurisdiction is substituted for the statement of the Reporter. Part of the opinion only is given. — Ed.

jurisdiction to adjudicate upon the marriage relation existing between these parties. To each State belongs the exclusive right and power of determining upon the status of its resident and domiciled citizens and subjects, in respect to the question of marriage and divorce, and no other State, nor its judicial tribunals, can acquire any lawful jurisdiction to interfere in such matters between any such subjects, when neither of them has become *bona fide* domiciled within its limits; and any judgment rendered by any such tribunal, under such circumstances, is an absolute nullity. *Ditson v. Ditson*, 4 R. I. 93; *Cooley Const. Lim.* 400, and notes; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30; *Hanover v. Turner*, 14 Mass. 227. It does not appear upon the face of the judgment or decree, or in any of its recitals, that either of the parties were ever residents of said territory of Utah, or domiciled therein. This is a jurisdictional matter, which should appear, to entitle the judgment to any respect whatever; for though it be conceded that the probate court that rendered the judgment was in the legal sense a court of record, "its jurisdiction," if any, under the local laws of the territory, "over the subject of divorce, was a special authority not recognized by the common law, and its proceedings in relation to it stand upon the same footing with those of courts of limited and inferior jurisdiction," unaided by any legal presumptions in their favor. *Com. v. Blood*, 97 Mass. 538. The evidence was properly excluded.¹

HADDOCK v. HADDOCK.

SUPREME COURT OF THE UNITED STATES. 1906.

[Reported 201 U. S. 562.]

WHITE, J. The plaintiff in error will be called the husband and the defendant in error the wife.

The wife, a resident of the State of New York, sued the husband in that State in 1899, and there obtained personal service upon him. The complaint charged that the parties had been married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property. A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the State of Connecticut a divorce which was conclusive.

Concurring

① Peckham

② Holmes

③ Harlan

④ McKenna

⑤ White

⑥ Holmes

⑦ Brown

⑧ Harlan

⑨ Peckham

At the trial before a referee the judgment roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, viz., desertion by the wife, was false. The referee sustained the objections and an exception was noted. The judgment roll in question was then marked for identification and forms a part of the record before us.

Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that the wife was a resident of the State of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband without justifiable cause abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of \$780 a year from the date of the judgment. The action of the referee was sustained by the Supreme Court of the State of New York, and a judgment for separation and alimony was entered in favor of the wife. This judgment was affirmed by the Court of Appeals. As by the law of the State of New York, after the affirmance by the Court of Appeals, the record was remitted to the Supreme Court, this writ of error to that court was prosecuted.

The Federal question is, Did the court below violate the Constitution of the United States by refusing to give to the decree of divorce rendered in the State of Connecticut the faith and credit to which it was entitled?

As the averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of State cognizance, we may not allow them to even indirectly influence our judgment upon the Federal question to which we are confined, and we, therefore, put these subjects entirely out of view. Moreover, as, for the purpose of the Federal issue, we are concerned not with the mere form of proceeding by which the Federal right, if any, was denied, but alone have power to decide whether such right was denied, we do not inquire whether the New York court should preferably have admitted the record of the Connecticut divorce suit, and, after so admitting it, determine what effect it would give to it instead of excluding the record and thus refusing to give effect to the judgment. In order to decide whether the refusal of the court to admit in evidence the Connecticut decree denied to that decree the efficacy to which it was entitled under the full faith and credit clause, we must first examine the judgment roll of the Connecticut cause in order to fix the precise circumstances under which the decree in that cause was rendered.

Without going into detail, it suffices to say that on the face of the Connecticut record it appeared that the husband, alleging that he had acquired a domicile in Connecticut, sued the wife in that State as a per-

son whose residence was unknown, but whose last known place of residence was in the State of New York, at a place stated, and charged desertion by the wife and fraud on her part in procuring the marriage; and, further, it is shown that no service was made upon the wife except by publication and by mailing a copy of the petition to her at her last known place of residence in the State of New York.

With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous decisions of this court, and which are required to be borne in mind in analyzing the ultimate issue to be decided.

First. The requirement of the Constitution is not that some, but that full, faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit clause that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. *Harding v. Harding*, 198 U. S. 317.

Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the State where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the State where rendered, the enforcement of such a judgment. *Pennoyer v. Neff*, 95 U. S. 714. The facts in that case were these: Neff, who was a resident of a State other than Oregon, owned a tract of land in Oregon. Mitchell, a resident of Oregon, brought a suit in a court of that State upon a money demand against Neff. The Oregon statutes required, in the case of personal action against a non-resident, a publication of notice, calling upon the defendant to appear and defend, and also required the mailing to such defendant at his last known place of residence of a copy of the summons and complaint. Upon affidavit of the absence of Neff, and that he resided in the State of California, the exact place being unknown, the publication required by the statute was ordered and made, and judgment by default was entered against Neff. Upon this judgment execution was issued and real estate of Neff was sold and was ultimately acquired by Pennoyer. Neff sued in the Circuit Court of the United States for the District of Oregon to recover the property, and the question presented was the validity in Oregon of the judgment there rendered against Neff. After the most elaborate consideration it was expressly decided that the judgment rendered in Oregon under the circumstances stated was void for want of jurisdiction and was repugnant to the due process clause of the Constitution of

the United States. The ruling was based on the proposition that a court of one State could not acquire jurisdiction to render a personal judgment against a non-resident who did not appear by the mere publication of a summons, and that the want of power to acquire such jurisdiction by publication could not be aided by the fact that under the statutes of the State in which the suit against the non-resident was brought the sending of a copy of the summons and complaint to the post office address in another State of the defendant was required and complied with. The court said (p. 727) :

"Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

And the doctrine thus stated but expressed a general principle expounded in previous decisions. *Bischoff v. Wethered*, 9 Wall. 812. In that case, speaking of a money judgment recovered in the Common Pleas of Westminster Hall, England, upon personal notice served in the city of Baltimore, Mr. Justice Bradley, speaking for the court, said (p. 814) :

"It is enough to say[of this proceeding] that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law against property of the defendant there situate, it can have no validity here, even of a *prima facie* character. It is simply null."

Third. The principles, however, stated in the previous proposition are controlling only as to judgments *in personam* and do not relate to proceedings *in rem*. That is to say, in consequence of the authority which government possesses over things within its borders there is jurisdiction in a court of a State by a proceeding *in rem*, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. *Pennoyer v. Neff*, *supra*.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one State, conformably to the laws of such State, or the State through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. *Maynard v.*

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Hill, 125 U. S. 190. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicile in the Territory of Washington. Being there so domiciled, an act of the legislature of the Territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the Territory of Washington to recover real estate situated in the Territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs. Maynard had no notice and that she was not a resident of the Territory when the act was passed. From a decree of the Supreme Court of the Territory adverse to their claim the children brought the case to this court. The power of the territorial legislature, in the absence of restrictions in the organic act, to grant a divorce to a citizen of the Territory was, however, upheld, in view of the nature and extent of the authority which government possessed over the marriage relation. It was therefore decided that the courts of the Territory committed no error in giving effect within the Territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy.

Fifth. It is no longer open to question that where husband and wife are domiciled in a State there exists jurisdiction in such State, for good cause, to enter a decree of divorce which will be entitled to enforcement in another State by virtue of the full faith and credit clause. It has, moreover, been decided that where a *bona fide* domicile has been acquired in a State by either of the parties to a marriage, and a suit is brought by the domiciled party in such State for a divorce, the courts of that State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the full faith and credit clause. *Cheever v. Wilson* 9 Wall. 108.

Sixth. Where the domicile of matrimony was in a particular State, and the husband abandons his wife and goes into another State in order to avoid his marital obligations, such other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and, therefore, is not to be treated as the actual or constructive domicile of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicile until a new actual domicile be by her elsewhere acquired. This was clearly expressed in *Barber v. Barber*, 21 How. 582, where it was said (p. 595):

"The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessities nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers. . . ."

And the same doctrine was expressly upheld in *Cheever v. Wilson*, *supra*, where the court said (9 Wall. 123):

"It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues."

Seventh. So also it is settled that where the domicil of a husband is in a particular State, and that State is also the domicil of matrimony, the courts of such State having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the State of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the full faith and credit clause. *Atherton v. Atherton*, 181 U. S. 155.

Coming to apply these settled propositions to the case before us three things are beyond dispute: *a.* In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State. *b.* As New York was the domicil of the wife and the domicil of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicil of the wife continued in New York. *c.* As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicil in that State, and was not there individually domiciled and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicil of the wife within the State or as the result of personal service upon her within its borders.

These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicil of the hus-

If H has given
his cause for
divorce, W's
domicil is with
him.

band in that State, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other States in and by virtue of the full faith and credit clause of the Constitution. In other words, the final question is whether to enforce in another jurisdiction the Connecticut decree would not be to enforce in one State, a personal judgment rendered in another State against a defendant over whom the court of the State rendering the judgment had not acquired jurisdiction. Otherwise stated, the question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a State to persons within its jurisdiction, but on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is therefore embraced, either within the letter or spirit of the doctrines stated in the third and fourth propositions?

Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject matter or of the person of the defendant, the courts of another State are not required, by virtue of the full faith and credit clause of the Constitution, to enforce such decree. *National Exchange Bank v. Wiley*, 195 U. S. 257, 269, and cases cited.

I. The wide scope of the authority which government possesses over the contract of marriage and its dissolution is the basis upon which it is argued that the domicile within one State of one party to the marriage gives to such a State jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other States by force of the full faith and credit clause of the Constitution. But the deduction is destructive of the premise upon which it rests. This becomes clear when it is perceived that if one government, because of its authority over its own citizens has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government in virtue of its authority over marriage may dissolve the tie as to citizens of another government, other governments would have a similar power, and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed. To concretely illustrate: If the fact be that where persons are married in the State of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the State of Connecticut, there acquiring a domicile, and procure a dissolution of the marriage which would be binding in the State of New York

as to the party to the marriage there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail. And conversely the like result would follow if the marriage had been celebrated in Connecticut and desertion had been from that State to New York, and consequently the decree of divorce had been rendered in New York. Even a superficial analysis will make this clear. Under the rule contended for it would follow that the States whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other States. In other words, any person who was married in one State and who wished to violate the marital obligations would be able, by following the lines of least resistance, to go into the State whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and public policy of the other States. Thus the argument comes necessarily to this, that to preserve the lawful authority of all the States over marriage it is essential to decide that all the States have such authority only at the sufferance of the other States. And the considerations just stated serve to dispose of the argument that the contention relied on finds support in the ruling made in *Maynard v. Hill*, referred to in the fourth proposition, which was at the outset stated. For in that case the sole question was the effect within the Territory of Washington of a legislative divorce granted in the Territory to a citizen thereof. The upholding of the divorce within the Territory was, therefore, but a recognition of the power of the territorial government, in virtue of its authority over marriage, to deal with a person domiciled within its jurisdiction. The case, therefore, did not concern the extraterritorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the Constitution of the United States in another jurisdiction as to citizens of other States to whom the jurisdiction of the Territory did not extend.

The anomalous result which it is therefore apparent would arise from maintaining the proposition contended for is made more manifest by considering the instrument from which such result would be produced, that is, the full faith and credit clause of the Constitution. No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. No one, moreover, can deny that, prior to the adoption of the Constitution, the extent to which the States would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the Constitution delegated no authority to the Government of the United States on the subject of marriage

and divorce. Yet, if the proposition be maintained, it would follow that the destruction of the power of the States over the dissolution of marriage, as to their own citizens, would be brought about by the operation of the full faith and credit clause of the Constitution. That is to say, it would come to pass that, although the Constitution of the United States does not interfere with the authority of the States over marriage, nevertheless the full faith and credit clause of that instrument destroyed the authority of the States over the marriage relation. And as the Government of the United States has no delegated authority on the subject, that Government would be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus neither the States nor the National Government would be able to exert that authority over the marriage tie possessed by every other civilized government. Yet, more remarkable would be such result when it is borne in mind that, when the Constitution was adopted, nowhere, either in the mother country or on the continent of Europe, either in adjudged cases or in the treatises of authoritative writers, had the theory ever been upheld or been taught or even suggested that one government, solely because of the domicile within its borders of one of the parties to a marriage, had authority, without the actual or constructive presence of the other, to exert its authority by a dissolution of the marriage tie, which exertion of power it would be the duty of other States to respect as to those subject to their jurisdiction.

II. It is urged that the suit for divorce was a proceeding *in rem*, and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the *res*, entitled to be enforced in the State of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicile of the person there suing and yet attributes to the decree resting upon the domicile of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject matter of the controversy. But putting this contradiction aside, what, may we ask, was the *res* in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory then upon which the proposition proceeds must be that the *res* in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that State, it must be admitted, under the hypothesis stated, that before the husband deserted the wife in New York, the *res* was in New York and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicile in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to

the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the *res*, it follows that it was divisible, and therefore there was a *res* in the State of New York and one in the State of Connecticut. Thus considered, it is clear that the power of one State did not extend to affecting the thing situated in another State. As illustrating this conception, we notice the case of *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 485. The facts in that case were these: A bill was filed in a District Court of the United States for the District of Iowa to abate a nuisance alleged to have been occasioned by a bridge across the Mississippi River dividing the States of Illinois and Iowa. Under the assumption that the nuisance was occasioned by the operation of the bridge on the Illinois side, the court, after pointing out that the United States Circuit Court for the District of Iowa exercised the same jurisdiction that a State court of Iowa could exercise and no more, said (p. 494):

“The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court’s jurisdiction and powers of inquiry, and outside of the case.”

Nor has the conclusive force of the view which we have stated been met by the suggestion that the *res* was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in different places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that State had the power to determine the status of the non-resident wife by a decree which had obligatory force outside of the State of Connecticut. Here, again, the argument comes to this, that, because the State of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that State also had the authority to oust the State of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that State.

III. It is urged that whilst marriage is in one aspect a contract, it is nevertheless a contract in which society is deeply interested, and, therefore, government must have the power to determine whether a marriage exists or to dissolve it, and hence the Connecticut court had jurisdiction of the relation and the right to dissolve it, not only as to its own citizen but as to a citizen of New York who was not subject to the jurisdiction of the State of Connecticut. The proposition involves in another form of statement the *non sequitur* which we have previously pointed out; that is, that, because government possesses power over marriage, therefore the existence of that power must be rendered unavailing.

Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without at the same time saying that the marriage is dissolved as to both in every other jurisdiction, therefore the

Connecticut decree should have obligatory effect in New York as to the citizen of that State. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated. Besides, the proposition presupposes that, because in the exercise of its power over its own citizens, a State may determine to dissolve the marriage tie by a decree which is efficacious within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a State may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another State. The distinction was clearly pointed out in *Blackinton v. Blackinton*, 141 Mass. 432. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicile in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing fully that under the circumstances disclosed the domicile of the husband was not the domicile of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extraterritorial force. But this circumstance was held not to be controlling and the decree was awarded. The same doctrine was clearly expounded by the Privy Council, in an opinion delivered by Lord Watson, in the divorce case of *Le Mesurier v. Le Mesurier* (1895), A. C. 517, where it was said (p. 527):

“When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. . . . On the other hand, a decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority.”

IV. The contention that if the power of one State to decree a dissolution of a marriage which would be compulsory upon the other States be limited to cases where both parties are subject to the jurisdiction, the right to obtain a divorce could be so hampered and restricted as to be in effect impossible of exercise, is but to insist that in order to favor the dissolution of marriage and to cause its permanency to depend upon the mere caprice or wrong of the parties, there should not be applied to the right to obtain a divorce those fundamental principles which safeguard the exercise of the simplest rights. In other words, the argument but reproduces the fallacy already exposed, which is, that one State

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must be endowed with the attribute of destroying the authority of all the others concerning the dissolution of marriage in order to render such dissolution easy of procurement. But even if the true and controlling principles be for a moment put aside and mere considerations of inconvenience be looked at, it would follow that the preponderance of inconvenience would be against the contention that a State should have the power to exert its authority concerning the dissolution of marriage as to those not amenable to its jurisdiction. By the application of that rule each State is given the power of overshadowing the authority of all the other States, thus causing the marriage tie to be less protected than any other civil obligation, and this to be accomplished by destroying individual rights without a hearing and by tribunals having no jurisdiction. Further, the admission that jurisdiction in the courts of one State over one party alone was the test of the right to dissolve the marriage tie as to the other party although domiciled in another State, would at once render such test impossible of general application. In other words, the test, if admitted, would destroy itself. This follows, since if that test were the rule, each party to the marriage in one State would have a right to acquire a domicile in a different State and there institute proceedings for divorce. It would hence necessarily arise that domicile would be no longer the determinative criterion, but the mere race of diligence between the parties in seeking different forums in other States or the celerity by which in such States judgments of divorce might be procured would have to be considered in order to decide which forum was controlling.

On the other hand, the denial of the power to enforce in another State a decree of divorce rendered against a person who was not subject to the jurisdiction of the State in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the States over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy but also to protect the individual rights of their citizens. It does not deprive a State of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction, and does not debar other States from giving such effect to a judgment of that character as they may elect to do under mere principles of State comity. It causes the full faith and credit clause of the Constitution to operate upon decrees of divorce in the respective States just as that clause operates upon other rights, that is, it compels all the States to recognize and enforce a judgment of divorce rendered in other States where both parties were subject to the jurisdiction of the State in which the decree was rendered, and it enables the States rendering such decrees to take into view for the purpose of the exercise of their authority the existence of a matrimonial domicile from which the presence of a party not physically present within the borders of a State may be constructively found to exist.

Having thus disposed of the reasoning advanced to sustain the asser-

tion that the courts of the State of New York were bound by the full faith and credit clause to give full effect to the Connecticut decree, we are brought to consider the authorities relied upon to support that proposition.

Whilst the continental and English authorities are not alluded to in the argument, it may be well, in the most summary way, to refer to them as a means of illustrating the question for consideration. The extent of the power which independent sovereignties exercised over the dissolution of the marriage tie, as to their own citizens, gave rise, in the nature of things, to controversies concerning the extraterritorial effect to be given to a dissolution of such tie when made between citizens of one country by judicial tribunals of another country in which such citizens had become domiciled. We do not deem it essential, however, to consider the conflicting theories and divergent rules of public policy which were thus engendered. We are relieved of the necessity of entering upon such an inquiry, since it cannot be doubted that neither the practice nor the theories controlling in the countries on the continent lend the slightest sanction to the contention that a government, simply because one of the parties to a marriage was domiciled within its borders, where no matrimonial domicile ever existed, had power to render a decree dissolving a marriage which on principles of international law was entitled to obligatory extraterritorial effect as to the other party to the marriage, a citizen of another country. Wharton Conf. Laws, 3d ed., v. 1, p. 441, § 209 and notes.

It cannot be doubted, also, that the courts of England decline to treat a foreign decree of divorce as having obligatory extraterritorial force when both parties to the marriage were not subject to the jurisdiction of the court which rendered the decree. *Shaw v. Gould*, L. R. 3 H. L. 55; *Harvey v. Farnie*, 8 App. Cas. 43. And, although it has been suggested in opinions of English judges treating of divorce questions that exceptional occasions might arise which perhaps would justify a relaxation of the rigor of the presumption that the domicile of the husband was the domicile of the wife, per Lords Eldon and Redesdale, in *Tovey v. Lindsay*, 1 Dow. 133, 140; per Lord Westbury, in *Pitt v. Pitt*, 4 Macq. 627, 640; per Brett, L. J., in *Niboyet v. Niboyet*, 4 P. D. 1, 14; *Briggs v. Briggs*, 5 P. D. 163, 165; and per James and Cotton, L. J., in *Harvey v. Farnie*, 6 P. D. 47, 49, the courts of England, in cases where the jurisdiction was dependent upon domicile, have enforced the presumption and treated the wife as being within the jurisdiction where the husband was legally domiciled. But this conception was not a departure from the principle uniformly maintained, that, internationally considered, jurisdiction over both parties to a marriage was essential to the exercise of power to decree a divorce, but was simply a means of determining by a legal presumption whether both parties were within the jurisdiction. Of course the rigor of the English rule as to the domicile of the husband being the domicile of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire

a separate domicil. *Barber v. Barber*, 21 How. 582; *Cheever v. Wilson*, 9 Wall. 108; *Atherton v. Atherton*, 181 U. S. 155.

And even in Scotland, where residence, as distinguished from domicil, was deemed to authorize the exercise of jurisdiction to grant divorces, it was invariably recognized that the presence within the jurisdiction of both parties to the marriage was essential to authorize a decree in favor of the complainant. Wharton, *Conf. Laws*, § 215, v. 1, p. 447; per Lord Westbury, in *Shaw v. Gould*, L. R. 3 H. L. 88.

As respects the decisions of this court. We at once treat as inapposite, and therefore unnecessary to be here specially reviewed, those holding, *a*, that where the domicil of a plaintiff in a divorce cause is in the State where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other States to recognition under the full faith and credit clause (*Cheever v. Wilson*, *supra*); *b*, that, as distinguished from legal domicil, mere residence within a particular State of the plaintiff in a divorce cause brought in a court of such State is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant. *Andrews v. Andrews*, 188 U. S. 14; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Bell v. Bell*, 181 U. S. 175. This brings us to again consider a case heretofore referred to, principally relied upon as sustaining the contention that the domicil of one party alone is sufficient to confer jurisdiction upon a judicial tribunal to render a decree of divorce having extraterritorial effect, viz., *Atherton v. Atherton*, 181 U. S. 155. The decision in that case, however, as we have previously said, was expressly placed upon the ground of matrimonial domicil. This is apparent from the following passage, which we excerpt from the opinion, at page 171:

“This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.”

The contention, therefore, that the reasoning of the opinion demonstrates that the domicil of one of the parties alone was contemplated as being sufficient to found jurisdiction, but insists that the case decided a proposition which was excluded in unmistakable language. But, moreover, it is clear, when the facts which were involved in the *Atherton* case are taken into view, that the case could not have been decided merely upon the ground of the domicil of one of the parties, because that consideration alone would have afforded no solution of the problem which the case presented. The salient facts were these: The husband lived in Kentucky, married a citizen of New York, and the married

couple took up their domicile at the home of the husband in Kentucky, where they continued to reside and where children were born to them. The wife left the matrimonial domicile and went to New York. The husband sued her in Kentucky for a divorce. Before the Kentucky suit merged into a decree the wife, having a residence in New York sufficient, under ordinary circumstances, to constitute a domicile in that State, sued the husband in the courts of New York for a limited divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband, were pending in the respective States at the same time. The husband obtained a decree in the Kentucky suit before the suit of the wife had been determined, and pleaded such decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree and the case came here, and this court decided that the courts of New York were bound to give effect to the Kentucky decree by virtue of the full faith and credit clause. Under these conditions it is clear that the case could not have been disposed of on the mere ground of the individual domicile of the parties, since upon that hypothesis, even if the efficacy of the individual domicile had been admitted, no solution would have been thereby afforded of the problem which would have arisen for decision, that problem being which of the two courts wherein the conflicting proceedings were pending had had the paramount right to enter a binding decree. Having disposed of the case upon the principle of matrimonial domicile, it cannot in reason be conceived that the court intended to express an opinion upon the soundness of the theory of individual and separate domicile which, isolatedly considered, was inadequate to dispose of, and was, therefore, irrelevant to, the question for decision. . . .¹

Without questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the State of New York to give to a decree of that character rendered in Connecticut, within the borders of the State of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that State, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore,

Affirmed.

HOLMES, J., with whom concurred HARLAN, BREWER, and BROWN, JJ., dissenting.²

I do not suppose that civilization will come to an end whichever way

¹ The learned judge here examined numerous decisions of State courts, and concluded that they did not establish the proposition that such a decree as the one here examined was entitled to full faith and credit. — ED.

² Another dissenting opinion of BROWN, J., is omitted. — ED.

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this case is decided. But as the reasoning which prevails in the mind of the majority does not convince me, and as I think that the decision not only reverses a previous well-considered decision of this court but is likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage, I think it proper to express my views. Generally stated, the issue is whether, when a husband sues in the court of his domicile for divorce from an absent wife on the ground of her desertion, the jurisdiction of the court, if there is no personal service, depends upon the merits of the case. If the wife did desert her husband in fact, or if she was served with process, I understand it not to be disputed that a decree of divorce in the case supposed would be conclusive, and so I understand it to be admitted that if the court of another State on a retrial of the merits finds them to have been decided rightly its duty will be to declare the decree a bar to its inquiry. The first form of the question is whether it has a right to inquire into the merits at all. But I think that it will appear directly that the issue is narrower even than that.

In *Atherton v. Atherton*, 181 U. S. 155, a divorce was granted on the ground of desertion, to a husband in Kentucky against a wife who had established herself in New York. She did not appear in the suit and the only notice to her was by mail. Before the decree was made she sued in New York for a divorce from bed and board, but pending the latter proceedings the Kentucky suit was brought to its end. The husband appeared in New York and set up the Kentucky decree. The New York court found that the wife left her husband because of his cruel and abusive treatment, without fault on her part, held that the Kentucky decree was no bar, and granted the wife her divorce from bed and board. The New York decree, after being affirmed by the Court of Appeals, was reversed by this court on the ground that it did not give to the Kentucky decree the faith and credit which it had by law in Kentucky. Of course, if the wife left her husband because of his cruelty and without fault on her part, as found by the New York court, she was not guilty of desertion. Yet this court held that the question of her desertion was not open but was conclusively settled by the Kentucky decree.

There is no difference, so far as I can see, between *Atherton v. Atherton* and the present case, except that in *Atherton v. Atherton* the forum of the first decree was that of the matrimonial domicile, whereas in this the court was that of a domicile afterwards acquired. After that decision any general objection to the effect of the Connecticut decree on the ground of the wife's absence from the State comes too late. So does any general objection on the ground that to give it effect invites a race of diligence. I therefore pass such arguments without discussion, although they seem to me easy to answer. Moreover, *Atherton v. Atherton* decides that the jurisdiction of the matrimonial domicile, at least, to grant a divorce for the wife's desertion without personal service, does not depend upon the fact of her desertion, but continues even if her husband's cruelty has driven her out of the State and she has ac-

quired a separate domicile elsewhere upon the principles which we all agree are recognized by this court.

I can see no ground for giving a less effect to the decree when the husband changes his domicile after the separation has taken place. The question whether such a decree should have a less effect is the only question open, and the issue is narrowed to that. No one denies that the husband may sue for divorce in his new domicile, or, as I have said, that if he gets a decree when he really has been deserted, it will be binding everywhere. *Hawkins v. Ragsdale*, 20 Ky. 338, cited 151 U. S. 122; *Cooley v. Clarke*, 125 U. S. 701, 705. It is unnecessary to add more cases. The only reason which I have heard suggested for holding the decree not binding as to the fact that he was deserted, is that if he is deserted his power over the matrimonial domicile remains so that the domicile of the wife accompanies him wherever he goes, whereas if he is the deserter he has no such power. Of course this is a pure fiction, and fiction always is a poor ground for changing substantial rights. It seems to me also an inadequate fiction, since by the same principle, if he deserts her in the matrimonial domicile, he is equally powerless to keep her domicile there, if she moves into another State. The truth is that jurisdiction no more depends upon both parties having their domicile within the State, than it does upon the presence of the defendant there, as is shown not only by *Atherton v. Atherton*, but by the rights of the wife in the matrimonial domicile when the husband deserts.

There is no question that a husband may establish a new domicile for himself, even if he has deserted his wife. Yet in these days of equality I do not suppose that it would be doubted that the jurisdiction of the court of the matrimonial domicile to grant a divorce for the desertion remained for her, as it would for him in the converse case. See *Cheever v. Wilson*, 9 Wall. 108. Indeed, in *Ditson v. Ditson*, 4 R. I. 87, which, after a quotation of Judge Cooley's praise of it, is stated and relied upon as one of the pillars for the decision of *Atherton v. Atherton*, a wife was granted a divorce, without personal service, in the State of a domicile acquired by her after separation, on the sole ground that in the opinion of the court its decree would be binding everywhere. If that is the law it disposes of the case of a husband under similar circumstances, that is to say of the present case, *a fortiori*; for I suppose that the notion that a wife can have a separate domicile from her husband is a modern idea. At least *Ditson v. Ditson* confirms the assumption that jurisdiction is not dependent on the wife's actually residing in the same State as her husband, which has been established by this court. *Atherton v. Atherton*, 181 U. S. 155; *Maynard v. Hill*, 125 U. S. 190; *Cheever v. Wilson*, 9 Wall. 108. When that assumption is out of the way, I repeat that I cannot see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicile and that, admitted to exist to some extent, in a domicile later acquired. I also repeat and emphasize that if the finding of a second court, contrary to the decree, that the husband was the deserter, destroys the jurisdiction in the later acquired domicile because the domicile of the wife does not follow his, the

same fact ought to destroy the jurisdiction in the matrimonial domicile if in consequence of the husband's conduct the wife has left the State. But *Atherton v. Atherton* decides that it does not.

It is important to bear in mind that the present decision purports to respect and not to overrule *Atherton v. Atherton*. For that reason, among others, I spend no time in justifying that case. And yet it appears to me that the whole argument which prevails with the majority of the court is simply an argument that *Atherton v. Atherton* is wrong. I have tried in vain to discover anything tending to show a distinction between that case and this. It is true that in *Atherton v. Atherton*, Mr. Justice Gray confined the decision to the case before the court. Evidently, I should say, from internal evidence, in deference to scruples which he did not share. But a court by announcing that its decision is confined to the facts before it does not decide in advance that logic will not drive it further when new facts arise. New facts have arisen. I state what logic seems to me to require if that case is to stand, and I think it reasonable to ask for an articulate indication of how it is to be distinguished.

I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis. When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts (R. L. c. 219, § 10), the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference. But I can find no basis for giving a greater jurisdiction to the courts of the husband's domicile when the married pair happens to have resided there for a month, even if with intent to make it a permanent abode, than if they had not lived there at all.

I may add, as a consideration distinct from those which I have urged, that I am unable to reconcile with the requirements of the Constitution, Art. 4, § 1, the notion of a judgment being valid and binding in the State where it is rendered, and yet depending for recognition to the same extent in other States of the Union upon the comity of those States. No doubt some color for such a notion may be found in State decisions. State courts do not always have the Constitution of the United States vividly present to their minds. I am responsible for language treating what seems to me the fallacy as open, in *Blackinton v. Blackinton*, 141 Mass. 432, 436. But there is no exception in the words of the Constitution. "If the judgment is conclusive in the State where it was pronounced it is equally conclusive everywhere." *Christmas v. Russell*, 5 Wall. 290, 302; *Marshall, C. J.*, in *Hampton v. McConnel*, 8 Wheat. 234; *Mills v. Duryee*, 7 Cranch, 481, 485; *Story, Const.* § 1313. See also *Hancock National Bank v. Farnum*, 176 U. S. 640,

644, 645. I find no qualification of the rule in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265. That merely decided, with regard to a case not within the words of the Constitution, that a State judgment could not be sued upon when the facts which it established were not a cause of action outside the State. It did not decide or even remotely suggest that the judgment would not be conclusive as to the facts if in any way those facts came in question. It is decided as well as admitted that a decree like that rendered in Connecticut in favor of a deserting husband is binding in the State where it is rendered. *Maynard v. Hill*, 125 U. S. 190. I think it enough to read that case in order to be convinced that at that time the court had no thought of the divorce being confined in its effects to the Territory where it was granted, and enough to read *Atherton v. Atherton* to see that its whole drift and tendency now are reversed and its necessary consequences denied.

TURNER v. THOMPSON.

HIGH COURT OF JUSTICE, PROBATE DIVISION. 1888.

[*Reported 13 Probate Division, 37.*]

SIR JAMES HANNEN, PRESIDENT. The facts of this case are as follows: The petitioner, Georgiana Turner, was a British subject, domiciled in England, and, on November 7, 1872, she married, in England, the respondent, who is a citizen of the United States, domiciled there. He was in the United States marine service, and he was from time to time engaged professionally away from his wife; but they met and cohabited together at various places in the United States and elsewhere. In 1879 she instituted proceedings in the United States for a decree dissolving the marriage on the ground of her husband's incompetency; the form of decree in the United States being a dissolution of marriage, and not, as in this country, a declaration that the marriage was null and void. That is a mere difference in form. The marriage was accordingly dissolved, and she has now returned to England to institute proceedings here for the purpose of having her marriage declared null and void. The case came before my brother Butt, and he raised the question whether there was anything on which this court could proceed, and whether this court has any jurisdiction, because, of course, if the marriage were absolutely dissolved by the court in the United States, then there exists no marriage between the parties upon which this court can be called on to pronounce an opinion. Mr. Justice Butt ordered the case to be argued by the Queen's Proctor, and it now comes before me.

I am of opinion that this court has no jurisdiction, in the sense I have already mentioned; that is, that the marriage was totally and absolutely dissolved by the decree of the court in the United States; and therefore that there is no marriage between the parties, which could be dissolved or declared null and void by this court.

The marriage, though it took place in England, must, no doubt, according to the decision in *Harvey v. Farnie*, 8 App. Cas. 43, which went up to the House of Lords, be taken to be *prima facie* an American marriage, because the husband was domiciled in the United States, and *prima facie* the courts of the place of his domicile had jurisdiction in the matter. If the parties had remained in England, then, under some circumstances, the case of *Niboyet v. Niboyet*, 3 P. D. 52, is an authority for saying that the courts of this country would have jurisdiction. But, as a matter of fact, these parties after the solemnization of the marriage went to the United States and there took up their permanent abode. I am of opinion that the wife did completely acquire a domicile in the United States. I know it is alleged on her behalf that that is not so. It is said she was by origin a British subject, and as by the law of England the matter in dispute between her and her husband would have been disposed of in the form of a declaration that the marriage was null, she therefore was entitled to treat the marriage as null and void from the beginning, so that she never lost her English domicile at all. The fallacy which underlies that argument appears to me to be evident from this. A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicile of her husband if she lives with him in the country of his domicile. There is no ground here for contending that she did not take up that domicile. She had the intention of taking up her permanent abode with him, and of making his country her permanent home. It is to be remembered that a marriage by the law of England, when one of the parties is incompetent, is not a marriage absolutely void, but only voidable at the instance of the injured party. If she had thought fit she might have remained a wife, enjoying all the advantages of a wife, save that of a marital intercourse. It was only in 1879, the marriage having taken place in 1872, that she instituted proceedings for getting that marriage put aside.

I am of opinion that at the time of the institution of that suit, which is the turning point of the proceeding, her domicile was, in fact and in law, in the United States; therefore the United States courts had jurisdiction in the matter, and upon this ground I think the petition must be dismissed.

CUMMINGTON v. BELCHERTOWN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1889.

[Reported 149 *Massachusetts*, 223.]

DEVENS, J. Mrs. Angie L. Richards, the expenses of whose support as an insane pauper are here in controversy, had, as Angie L. Root, a legal settlement in the defendant town at the time of her marriage. She acquired one in the plaintiff town by her marriage, on June 10,

1873, with Charles A. Richards, who was there settled. Milford v. Worcester, 7 Mass. 48. It is the contention of the plaintiff, that, the marriage of the pauper having been legally annulled as having been procured by fraud, her settlement in Cummington thus gained is destroyed, and that in Belchertown is revived, it having been suspended only during the *de facto* existence of the marriage.

It was held in Dalton v. Bernardston, 9 Mass. 201, that a woman acquiring a settlement by her marriage under the St. of 1793, c. 34 (Pub. Sts. c. 83, § 1, cl. 1), did not lose her settlement by a divorce, except for a cause which would show the marriage to have been void. In the latter case, there would have been no such marriage as the statute intended as the means of acquiring a settlement. Assuming that the law would be the same where a marriage not originally void, but voidable on the ground of fraud, or for any other reason, was declared void, we consider the question whether the plaintiff has shown any sufficient evidence of a decree annulling the marriage by which the defendant or others collaterally affected by the marriage or the dissolution of it would be bound. If the pauper herself would not be bound by such a decree, it is quite clear that the defendant would not be, whether the marriage was absolutely void or voidable only. Not being a party to the decree, and unable, therefore, to take any steps to reverse it, the defendant is not precluded from showing in a collateral proceeding that the decree was erroneous, or that it has no effect such as the plaintiff claims for it. The plaintiff contends that a decree valid as against the pauper, by which her marriage with Richards has been annulled, has been rendered by the Supreme Court of New York, having jurisdiction both of the subject-matter and of the parties.

It appeared that Richards and his wife lived together in this State for about a year and three months, when, in October, 1874, Mrs. Richards was adjudged insane, and legally committed to the lunatic hospital in Northampton, where she remained, with the exception of short intervals of time during which she was in the custody of her parents, until September 20, 1877, when she was again and finally committed to the hospital, and has remained, and now remains, hopelessly insane. Richards never cohabited with her after her first committal to the hospital; and at some time thereafter, but at what time does not appear, removed to the State of New York, without, however, any purpose of there obtaining a divorce, and without then having it in mind. On November 14, 1881, Richards, having only a short time before been informed for the first time that his wife had been insane before their marriage, commenced a proceeding in New York to have the marriage annulled, on the ground that he was induced to enter into it by fraud, and, after a notice to Mrs. Richards by a summons served upon her while an inmate of the Northampton Hospital, a decree annulling the marriage on the ground that the consent of Richards to the marriage was obtained by fraud was rendered on March 30, 1882. A "transcript of the doings and record of, and testimony in, the Supreme Court, County of Fulton,

State of New York," was used at the trial in the Superior Court, and the decree there rendered was relied on by the plaintiff as establishing the fact of a legal dissolution of the marriage, by which the rights of the plaintiff and of the defendant would be affected in this Commonwealth.

While by the Constitution of the United States, Art. 4, § 1, full faith and credit are to be given to the judgments of other States, the jurisdiction of the courts rendering them is open to inquiry, both as regards the subject-matter of the controversy and the parties thereto. The recitals of the record are not conclusive evidence, and a party, or one affected collaterally by the judgment, may show that the court had no jurisdiction over the party such as it assumed to exercise. Mrs. Richards was, when the proceedings were commenced and concluded, an utterly insane woman. This not only appears by the finding of the Superior Court, but by all the proceedings of the New York court. It is averred in the petition addressed to it, and the allegations of the petition are found by the referee to whom the inquiries of fact were referred, and by that court, to have been true. It appears also by the return of the summons, and most clearly by the evidence taken before the referee. At no time did she, or any one on her behalf, appear before the referee or the court. Yet no guardian, next friend, or other person was appointed to represent her, and a decree annulling her marriage was rendered against a person whom the record and evidence showed to be insane, and whose rights were wholly unprotected. She had no actual residence in New York at any time. Her husband had abandoned her here on account of her insanity some time before he went to New York, had made no provision for her support, and she had always resided in this State, which was her domicile of origin.

That a decree of divorce rendered under similar circumstances of residence and condition of the wife in another State would not be recognized in the State of New York, or allowed in any way, directly or indirectly, there to affect any rights, whether of person or property, of the party against whom it had been made, appears clearly from its decisions. *People v. Baker*, 76 N. Y. 78; *Jones v. Jones*, 108 N. Y. 415. We shall not have occasion to consider what would be the effect that should be given here to a decree of divorce, under the circumstances above stated, if such had been rendered by the New York court. Such a decree necessarily implies the original existence of a lawful marriage. A decree annulling a marriage upon the ground that it was contracted under such circumstances that the party petitioning has a right to have it so annulled, stands upon quite different grounds. The validity of a marriage depends upon the question whether it was valid where it was contracted. To this rule there are but two exceptions: marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, and those marriages which the Legislature of the Commonwealth has declared shall not be valid because contrary to the policy of our own laws. *Commonwealth v. Lane*,

133 Mass. 453. Even when parties had gone from this Commonwealth into another State with intent of evading our own laws, and had there married it was held reluctantly, in the absence of a statute declaring marriage solemnized there void, such intent to be void here that their validity must be recognized. *Malway v. Needham*, 16 Mass. 157. *Parsons v. Parsons*, 5 Pick. 453.

Without discussing the failure to appoint a guardian, the service in the case at bar on Mrs. Richards can have given the New York court no jurisdiction over her personally. To hold that her domicile might be changed to any other State by the act of her husband in removing thence after he had abandoned her here and ceased to support her, and thus that she could be deprived of the protection in her marital rights, whether of person or property, which this State could extend to her, would be to use the legal fiction of the unity created by the marriage to her serious injury, and to work great injustice.

If the decree of the New York court is to have any validity here, it must be on grounds of comity. *Blackinton v. Blackinton*, 141 Mass. 432, 436. There can be no ground of comity which requires that we should recognize the decree of a New York court annulling a Massachusetts marriage between Massachusetts citizens, unless it had jurisdiction of both the parties: nor even if it did have such jurisdiction should it be recognized here, unless it was based upon grounds which are here held to be sufficient. Suppose two citizens of Massachusetts are married here, each of the age of eighteen years, have children, and then move to New York, where the husband obtains a decree of nullity on the ground that persons under the age of twenty-one years cannot lawfully marry. The children are not therefore rendered illegitimate in Massachusetts, so that they cannot here inherit their father's lands. Marriages between blacks and whites are still prohibited in some of the States, but a decree in such a State annulling a marriage of this character valid where contracted could not here be regarded. Illustrations of this sort, growing out of the different laws as to marriage in the several States, could readily be multiplied. The right of a State to declare the present or future status, so far as its own limits are concerned, of persons there lawfully domiciled, cannot be extended so as to enable it to determine absolutely what such status was at a previous time, and while they were subject to the laws of another State. The decrees of its courts in the latter respect must be subject to revision in the State where rights were then existing, or had been acquired. *Blackinton v. Blackinton*, 141 Mass. 432.

The cause alleged and found by the New York court was not sufficient to annul a marriage contracted in Massachusetts between its citizens according to the laws of this Commonwealth. Assuming that a marriage may here be declared void on account of fraud, and assuming that fraud is a cause which will enable the party defrauded to maintain a libel for the dissolution of the marriage which has thereby been procured, although the word "fraud," which is found in the Gen. Sts. c. 107,

§§ 4, 5, is omitted in the Pub. Sts. c. 145, § 11, no fraud was shown such as would enable a party here to avoid a marriage. Mrs. Richards was sane at the time of her marriage, and entirely competent to make the marriage contract; she had been insane at a previous period, but had recovered from such attacks, and the fact of such previous insanity was concealed from her husband by Mrs. Richards herself and her family, in the hope that marriage would prove beneficial to her health. She lived with her husband about a year and three months before symptoms of insanity again developed themselves. The possibility or probability that she might again become insane, growing out of the fact that she had previously been so, did not constitute such a fraud as entitled her husband to have the marriage dissolved.

There was no fraud of such a character as to affect the basis or the essential character of the contract. *Donovan v. Donovan*, 9 Allen, 140; *Foss v. Foss*, 12 Allen, 26. "It is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, although occasioned by disingenuous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage. . . . Therefore no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice." Bigelow, C. J., in *Reynolds v. Reynolds*, 3 Allen, 605.

Upon the ground, then, that the decree of the New York court attempts to annul a marriage contracted in Massachusetts between Massachusetts citizens, and thus affect the legal status of the woman who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court, and deprive her of the rights acquired by her marriage, and especially because it declares the marriage void for a reason on account of which, by the Massachusetts law, it cannot be avoided, we are of opinion that it should not be enforced here, and that no principle of interstate comity requires that we should give it effect.

For these reasons, a majority of the court are of opinion that the settlement acquired by Mrs. Richards by her marriage continues, and that judgment should be entered for the defendant.

*Judgment for the defendant.*¹

¹ See *Linke v. Van Aerde*, 10 Times L. Rep. 426; *Roth v. Roth*, 104 Ill. 35; *Blumenthal v. Tannenholz*, 31 N. J. Eq. 194; *Johnson v. Cooke*, [1898] 2 Ir. 130. — Ed.

PART II.

REMEDIES.

CHAPTER IV.

RIGHT OF ACTION.

BRITISH SOUTH AFRICAN CO. v. COMPANHIA DE MOÇAMBIQUE.

HOUSE OF LORDS. 1893.

[Reported [1893] *Appeal Cases*, 602.]

IN an action by the respondents against the appellants the plaintiffs by their statement of claim alleged (*inter alia*) that the plaintiff company was in possession and occupation of large tracts of lands and mines and mining rights in South Africa; and that the defendant company by its agents wrongfully broke and entered and took possession of the said lands, mines, and mining rights, and ejected the plaintiff company, its servants, agents, and tenants therefrom; and also took possession of some of the plaintiffs' personal property and assaulted and imprisoned some of the plaintiffs.

The statement of defence in paragraph 1—as to so much of the statement of claim as alleged a title in the plaintiff company to the lands, mines, and mining rights, and alleged that the defendants by their agents wrongfully broke and entered the same, and claimed a declaration of title and an injunction—whilst denying the alleged title and the alleged wrongful acts, said that the lands, mines, and mining rights were situate abroad, to wit in South Africa, and submitted that the court had no jurisdiction to adjudicate upon the plaintiffs' claim.

In paragraph 2 of the reply the plaintiffs objected that paragraphs 1 and 9 of the defence were bad in law, and alleged that paragraph 1

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ferable to the same jurisdiction. Among the latter are actions for trespasses and injuries to real property which are deemed local; so that they will not lie elsewhere than in the place *rei sitæ*."

The doctrine laid down by foreign jurists, which is said by Story to coincide in many respects with that of our common law, obviously had relation to the question of jurisdiction, and not to any technical rules determining in what part of a country a cause was to be tried. Story was indeed regarded by one of the learned judges in the court below (Lopes, L. J., [1892] 2 Q. B. 420) as sanctioning the view that our rules with regard to venue in the case of local actions offered the only obstacle to the exercise of jurisdiction in actions of trespass to real property. The passage relied on is as follows (s. 554): "Lord Mansfield and Lord Chief Justice Eyre held at one time a different doctrine, and allowed suits to be maintained in England for injuries done by pulling down houses in foreign unsettled regions, namely, in the desert coasts of Nova Scotia and Labrador. But this doctrine has been since overruled as untenable according to the actual jurisprudence of England, however maintainable it might be upon general principles of international law, if the suit were for personal damages only."

By the words "untenable according to the actual jurisprudence of England," I do not think Story was referring to the rule which in this country regulated the place of trial in the case of local actions. Nor am I satisfied that either Lord Mansfield or Story would have regarded an action of trespass to land as a suit for personal damages only, if the title to the land were at issue; and in order to determine whether there was a right to damages it was necessary for the court to adjudicate upon the conflicting claims of the parties to the real estate. In both the cases before Lord Mansfield, as I understand them, no question of title to real property was in issue. The sole controversy was, whether the British officers sued were, under the circumstances, justified in interfering with the plaintiffs in their enjoyment of it.

The question what jurisdiction can be exercised by the courts of any country according to its municipal law cannot, I think, be conclusively determined by a reference to principles of international law. No nation can execute its judgments, whether against persons or movables or real property, in the country of another. On the other hand, if the courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication *in personam*, it is by no means certain that any rule of international law would be violated. But in considering what jurisdiction our courts possess, and have claimed to exercise in relation to matters arising out of the country, the principles which have found general acceptance amongst civilized nations as defining the limits of jurisdiction are of great weight.

It was admitted in the present case, on behalf of the respondents, that the court could not make a declaration of title, or grant an injunction to restrain trespasses, the respondents having in relation to these

matters abandoned their appeal in the court below. But it is said that the court may inquire into the title, and, if the plaintiffs and not the defendants are found to have the better title, may award damages for the trespass committed. My Lords, I find it difficult to see why this distinction should be drawn. It is said, because the courts have no power to enforce their judgment by any dealing with the land itself, where it is outside their territorial jurisdiction. But if they can determine the title to it and compel the payment of damages founded upon such determination, why should not they equally proceed *in personam* against a person who, in spite of that determination, insists on disturbing one who has been found by the court to be the owner of the property?

It is argued that if an action of trespass cannot be maintained in this country where the land is situate abroad, a wrong-doer by coming to this country might leave the person wronged without any remedy. It might be a sufficient answer to this argument to say that this is a state of things which has undoubtedly existed for centuries without any evidence of serious mischief or any intervention of the legislature; for even if the Judicature Rules have the effect contended for, I do not think it can be denied that this was a result neither foreseen nor intended. But there appear to me, I confess, to be solid reasons why the courts of this country should, in common with those of most other nations, have refused to adjudicate upon claims of title to foreign land in proceedings founded on an alleged invasion of the proprietary rights attached to it, and to award damages founded on that adjudication.

The inconveniences which might arise from such a course are obvious, and it is by no means clear to my mind that if the courts were to exercise jurisdiction in such cases the ends of justice would in the long run, and looking at the matter broadly, be promoted. Supposing a foreigner to sue in this country for trespass to his lands situate abroad, and for taking possession of and expelling him from them, what is to be the measure of damages? There being no legal process here by which he could obtain possession of the lands, the plaintiff might, I suppose, in certain circumstances, obtain damages equal in amount to their value. But what would there be to prevent his leaving this country after obtaining these damages and re-possessioning himself of the lands? What remedy would the defendant have in such a case where the lands are in an unsettled country, with no laws or regular system of government, but where, to use a familiar expression, the only right is might? Such an occurrence is not an impossible, or even an improbable, hypothesis. It is quite true that in the exercise of the undoubted jurisdiction of the courts it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.

For the reasons with which I have troubled your Lordships at some length, I think the judgment appealed from should be reversed and the judgment of the Divisional Court restored, and that the respondents should pay the costs here and in the court below, and I move your Lordships accordingly.¹

ANONYMOUS.

GENERAL COURT OF MASSACHUSETTS BAY COLONY. 1648.

[*Reported 2 Massachusetts Colonial Records, 255.*]

A QUESTION arising about the interpretation of a clause in a law, made 42, about tryall of actions, &c., viz. whether a personall action, as for battery, &c. ariseing upon an act committed in England, & the parties come both into this iurisdiction, whether by law we are barred from trying the action of battery in this iurisdiction, the Courte hath voted that we are not barred by that lawe, because a personall action followeth the person, & from the person onely the cause of the action ariseth.

GARDNER v. THOMAS.

SUPREME COURT OF NEW YORK.

[*Reported 14 Johnson's Reports, 134.*]

YATES, J., delivered the opinion of the court.² This cause comes up on certiorari to the Justices' Court in New York. The action was for an assault and battery. The defendant pleaded that the assault and battery (if any) was committed on board of a British vessel upon the high seas, and that the plaintiff and defendant were both British subjects, one the master, and the other a sailor, on board the same vessel. To this plea there was a demurrer and joinder, on which judgment was given for the plaintiff below.

The question presented by this case is, whether this court will take cognizance of a tort committed on the high seas, on board of a foreign vessel, both the parties being subjects or citizens of the country to which the vessel belongs.

¹ LORDS HALSBURY, MACNAGHTEN, and MORRIS concurred.

Acc. (in addition to the authorities cited in the dissenting opinion in *Little v. Ry.*, *infra*), *Howard v. Ingersoll*, 23 Ala. 673. See *Laird v. R. R.*, 62 N. H. 254; *Tyson v. McGuiness*, 25 Wis. 656. — ED.

² The opinion only is given; it sufficiently states the case. — ED.

It must be conceded that the law of nations gives complete and entire jurisdiction to the courts of the country to which the vessel belongs, but not exclusively. It is exclusive only as it respects the public injury, but concurrent with the tribunals of other nations, as to the private remedy. There may be cases, however, where the refusal to take cognizance of causes for such torts may be justified by the manifest public inconvenience and injury which it would create to the community of both nations; and the present is such a case.

In *Mostyn v. Fabrigas* (Cowp. 176), Lord Mansfield, in his opinion there stated, is sufficiently explicit as to the doctrine, that for an injury committed on the high seas, circumstanced like the one now before us, an action may be sustained in the court of King's Bench; he only appears to doubt whether an action may be maintained in England for an injury in consequence of two persons fighting in France, when both are within the jurisdiction of the court. The present action, however, is for an injury on the high seas; and, of course, without the actual or exclusive territory of any nation.

The objection to the jurisdiction, because it must be laid in the declaration to be against the peace of the people, is not sufficient, for that is mere matter of form, and not traversable. In *Rafael v. Verelst*, 2 Black. Rep. 1058, De Grey, chief justice, says, that personal injuries are of a transitory nature, *et sequuntur forum rei*; and though, in all declarations, it is laid *contra pacem*, yet that is only matter of form, and not traversable.

It is evident, then, that our courts may take cognizance of torts committed on the high seas, on board of a foreign vessel, where both parties are foreigners; but I am inclined to think it must, on principles of policy, often rest in the sound discretion of the court to afford jurisdiction or not, according to the circumstances of the case. To say that it can be claimed in all cases, as matter of right, would introduce a principle which might, often times, be attended with manifest disadvantage, and serious injury to our own citizens abroad, as well as to foreigners here. Mariners might so annoy the master of a vessel as to break up the voyage, and thus produce great distress and ruin to the owners. The facts in this case sufficiently show the impropriety of extending jurisdiction, because it is a suit brought by one of the mariners against the master, both foreigners, for a personal injury sustained on board of a foreign vessel, on the high seas, and lying in port when the action was commenced, and, for aught that appears in the case, intending to return to their own country, without delay, other than what the nature of the voyage required. Under such circumstances, it is manifest that correct policy ought to have induced the court below to have refused jurisdiction, so as to prevent the serious consequences which must result from the introduction of a system, with regard to foreign mariners and vessels, destructive to commerce; since it must materially affect the necessary intercourse between nations, by which alone it can be maintained. The plaintiff, therefore, ought to

have been left to seek redress in the courts of his own country on his return. The judgment, for these reasons, may be deemed to be improvidently rendered in the court below, and is, therefore, reversed.

*Judgment of reversal.*¹

ROBERTS v. KNIGHTS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1863.

[Reported 7 Allen, 449.]

CONTRACT brought in the Police Court of Boston by the plaintiff, who is a British subject, against the master of a British vessel, who is also a British subject. The defendant objected, in the Police Court, that the court had no jurisdiction, and a hearing was thereupon had upon all the questions involved, and the case was dismissed, and the plaintiff appealed to the Superior Court.²

CHAPMAN, J. The question now presented is, whether our courts are bound to take jurisdiction of this case, both the parties being aliens, and having only a transient residence within the Commonwealth.

The Gen. Sts. do not settle the question. Not much light is thrown upon it by c. 123, § 1, cited by the plaintiff's counsel, which provides that, if neither party lives in the State, a transitory action may be brought in any county. Nor have we been able to find any provisions in any of our treaties with Great Britain which give us any aid. The

¹ See *Otis v. Wakeman*, 1 Hill, 604. In *Smith v. Crocker*, 14 App. Div. 245 (1897), O'Brien, J., said: "The contention that, because both the plaintiff and the defendant Crocker are non-residents, the trial court should have refused to entertain jurisdiction of the cause, we regard as equally untenable. We are referred to a number of cases (*Ferguson v. Neilson*, 83 N. Y. St. Repr. 814; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315) in which it was held that the courts of this State will not retain jurisdiction of and determine an action for tort between parties residing in other States on causes of action arising out of the State, as a matter of public policy, unless special reasons are shown to exist which make it necessary or proper so to do. An examination of the cases cited, as well as of all to which our attention has been called where that rule has been applied, were actions in tort, and not actions upon a contract. Our courts have never refused to entertain jurisdiction of a cause of action arising upon contract. In the case of *Davidsburgh v. The Knickerbocker Life Ins. Co.* (90 N. Y. 526), it was held that as the City Court of Brooklyn was a local court, of limited jurisdiction, unless the defendants came within the classes over which the statute had conferred jurisdiction upon this court, the parties could not confer jurisdiction by consent. This case is in no respect an authority for the rule contended for by the appellants. Whether, therefore, this contract was made in California or New York — upon which question much in favor of the view that it was a New York contract might be said — we do not think it is necessary to determine; as it appears that the action was one upon contract, the court committed no error in entertaining jurisdiction of the cause." — ED.

² Only so much of the case as involves this question is given. — ED.

question whether the courts of a country ought to take jurisdiction of litigation between aliens, temporarily residing within its limits, is primarily one of international law.

Vattel, b. 2, c. 8, § 103, says that by the law of nations disputes that may arise between strangers, or between a stranger and a citizen, ought to be terminated by the judge of the place, and also by the laws of the place. In 2 Kent's Com. (6th ed.) 64, this authority is cited, and the law is stated to be that if strangers are involved in disputes with our citizens, or with each other, they are amenable to the ordinary tribunals of the country. No distinction is made between transient and permanent residents.

In 1650 our colonial legislature passed an act, reciting that "whereas oftentimes it comes to pass that strangers coming amongst us have sudden occasions to try actions of several natures in our courts of justice," the right is therefore given to them. 3 Col. Rec. 202. See also Anc. Chart. 91. In 1672 another act was passed, confirming and regulating the right. 4 Col. Rec. part 2, 532. See also Anc. Chart. 192. These acts make no exception of cases of transient residence, and they established our municipal law at a very early date.

In *Barrell v. Benjamin*, 15 Mass. 354, it was objected that the defendant, whose domicile was in Demerara, being transiently here, was not liable to be sued in our courts by the plaintiff, whose domicile was in Connecticut, and who was also transiently here. The precise question which arises in the present case was not before the court, but the reasoning of Parker, C. J., goes to sustain the marginal note of the case, which is as follows: "It seems that one foreigner may sue another who is transiently within the limits of this State, upon a contract made between them in a foreign country."

In *Judd v. Lawrence*, 1 Cush. 531, it was held that an alien resident within the Commonwealth is entitled to the benefit of the insolvent laws. Since St. 1852, c. 29, aliens have been able to take, hold, and transmit real estate. It seems, therefore, to be the policy of modern times to enlarge rather than diminish the rights and privileges of aliens.

The courts of the United States have not jurisdiction where both parties are aliens, because this is not one of the enumerated cases in which jurisdiction is given to them. *Barrell v. Benjamin*, *ubi supra*; *Turner v. Bank of North America*, 4 Dall. 11; *Hodgson v. Bowerbank*, 5 Cranch, 303.

The argument *ab inconvenienti*, which is urged on behalf of the defendant, has much force. It is extremely inconvenient to one who is temporarily in a foreign country to be sued by a fellow-countryman in its courts. But it is met by an argument of equal force on the other side. If the plaintiff had no such remedy, he would often be subjected to great hardships. On the whole, it is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits.

The defendant relies upon a clause in the Merchants' Shipping Act (17 & 18 Vict. c. 104), which provides that, in a contract like that of the plaintiff, no seaman shall sue for wages in any court abroad, except in cases of discharge or of danger to life.

But this act cannot affect the question of jurisdiction, which, on the motion to dismiss, is the only question to be considered.¹

BURDICK v. FREEMAN.

COURT OF APPEALS, NEW YORK. 1890.

[*Reported 120 New York, 420.*]

FOLLETT, C. J. This action, begun February 19, 1895, is for criminal conversation.² . . . After the court had concluded its charge, the defendant asked that the jury be instructed "that the plaintiff cannot maintain this action in the courts of this State, and that this court has no jurisdiction of this case." This request was refused, and the defendant excepted. This action was for the recovery of damages for a personal injury. Code Civil Proc., § 3343, subd. 9. The courts of this State may, in their discretion, entertain jurisdiction of such an action between citizens of another State actually domiciled therein when the action was begun and tried, though the injury was committed in the State of their residence and domicile. *Gardner v. Thomas*, 14 Johns. 134; *Johnson v. Dalton*, 1 Cow. 543; *Dewitt v. Buchanan*, 54 Barb. 31; *McIvor v. McCabe*, 26 How. 257; *Newman v. Goddard*, 3 Hun, 70; *Mostyn v. Fabrigas*, 2 Smith, Lead. Cas. (9th ed.), 916; *Story, Conf. Laws*, § 542; *Whart. Conf. Laws*, §§ 705, 707, 743; 4 *Phillim. Int. Law*, 701. The judgments in *Molony v. Dows*, 8 Abb. Pr. 316, and *Latourette v. Clark*, 30 How. Pr. 242, in so far as they hold otherwise, must be regarded as overruled. The defendant had not left the State of his residence, nor had he removed his property therefrom, when this action was begun, and we find no sufficient reason for prosecuting it in the courts of this State. But this action had been pending for a year, and the question as to whether the court should entertain jurisdiction had not been raised by answer, by special motion, or during the trial; and we think that, while the Supreme Court might, in the exercise of its discretion, have refused to entertain the action, or dismissed it on its own motion, yet the defendant, not being entitled to a dismissal as a matter of right, ought not to be permitted to lie by until the close of the trial, when its probable result could be inferred, and then successfully invoke the exercise of the discretion of the court in his favor. The judgment should be affirmed, with costs. All concur, except BRADLEY and HAIGHT, JJ., not sitting.

¹ *Acc. Cofrode v. Gartner*, 79 Mich. 332, 44 N. W. 623. — ED.

² Part of the opinion is omitted. — ED.

CHAPTER V.

PROCEDURE.

DE LA VEGA v. VIANNA.

KING'S BENCH. 1830.

[Reported 1 *Barnewall & Adolphus*, 284.]

LORD TENTERDEN, C. J.¹ This was an application to discharge the defendant, who had been arrested upon mesne process, out of custody on filing common bail. The plaintiff and defendant were both foreigners; the debt was contracted in Portugal, and it appears that, by the law of that country, the defendant would not have been liable to arrest. It is contended on the authority of *Melan v. The Duke de Fitzjames*, 1 B. & P. 139, that he is entitled to the relief now sought. We are, however, of opinion, that he is not. In the case just mentioned, the distinction taken by Mr. Justice Heath, who differed from the other judges, was, that in construing contracts the law of the country in which they are made must govern, but that the remedy upon them must be pursued by such means as the law points out where the parties reside. This doctrine is said to correspond with the opinions of Huber and Voet. I have not had an opportunity of looking into those authorities, but we think, on consideration of the present case, that the distinction laid down by Mr. Justice Heath ought to prevail. A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to. The rule must be discharged.

*Rule discharged.*²

¹ The opinion only is given; it sufficiently states the case. — ED.

² *Acc.* *Imlay v. Ellefsen*, 2 East, 453; *Atwater v. Townsend*, 4 Conn. 47; *Smith v. Spinola*, 2 Johns. 198; *Anon.* (Austria, 12 Dec. 1876), 8 Clunet, 176. — ED.

BULLOCK v. CAIRD.

QUEEN'S BENCH. 1875.

[*Reported Law Reports*, 10 *Queen's Bench*, 276.]

ACTION by the plaintiffs against the defendant for the breach of an agreement to build a ship.

The material part of the agreement, which was set out in the declaration, was as follows:—

“Glasgow, July 15th, 1874. Messrs. Caird & Co., shipbuilders, Greenock, agree to build for Messrs. James and George Bullock & Co., London, who agree to accept an iron sailing ship of the following dimensions, &c.” Throughout the agreement the parties were mentioned as Caird & Co. and Bullock & Co.

Plea, that there was a trading partnership or firm domiciled and carrying on business in Scotland by the name of Caird & Co., and the alleged agreement was an agreement made in Scotland by the plaintiffs with the firm, and was to be performed wholly in Scotland without the jurisdiction of the English courts and within the jurisdiction of the Scotch courts, and by the law of Scotland the firm was and is a separate and distinct person from any or the whole of the individual members of whom it consists and of whom the defendant was and is one, and the firm, by the law of Scotland, is capable of maintaining the relation of debtor and creditor separate and distinct from the obligation of the partners as individuals, and can hold property, and has the capacity of suing and being sued as such separate person by its name of Caird & Co., and the alleged agreement was made by the firm as such separate person and not jointly and severally by the individual members thereof; that at the date of the agreements the firm consisted of certain individuals, namely, the defendant James Tennant Caird and Patrick Tennant Caird, and has always since consisted and still consists of the same members, and the firm and each of its individual members then was and always since has been and still is domiciled and carrying on business in Scotland, and within and subject to the jurisdiction of the Scotch courts and possessed of sufficient property and funds, within and subject to the jurisdiction to answer in full the claim of the plaintiffs; that by the law of Scotland the defendant became and was, as a partner of the firm of Caird & Co., on the making of the agreement, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual partners thereof jointly for any breaches of the agreement; and save as aforesaid no liability by the law of Scotland attached or attaches to the defendant in respect of the agreement; that by the law of Scotland it is a condition precedent to any individual liability attaching to the defendant or any individual members of the firm in respect of the agreements that the firm as such person as aforesaid or the whole individual partners thereof jointly

should first have been sued, and that judgment should have been recovered against the firm or the whole of the said partners jointly, and that the plaintiffs have not sued the firm of Caird & Co. nor the whole of the partners jointly, nor recovered judgment against it or them.

Demurrer to the plea and joinder.¹

BLACKBURN, J. It is quite clear that the firm of Caird & Co. are not a body corporate. The plea alleges that the firm, or the whole individual partners thereof jointly, should first have been sued. If one of the members of the firm was not joined it might be a bar to an action in Scotland, but it could only be pleaded in abatement in an action in England. I think all the matters stated in the plea are mere matter of procedure, and that the plea is bad.

MELLORE and FIELD, JJ., concurred.

*Judgment for the plaintiffs.*²

LE ROY v. BEARD.

SUPREME COURT OF THE UNITED STATES. 1849.

[Reported 8 Howard's Reports, 451.]

WOODBURY, J.³ This was an action of assumpsit for money had and received; and also counting specially, that, on the 17th of November, 1836, the original defendant, Le Roy, in consideration of \$1,800 then paid to him by the original plaintiff, Beard, caused to be made to the latter, at Milwaukie, Wisconsin, a conveyance, signed by Le Roy and his wife, Charlotte. This conveyance was of a certain lot of land situated in Milwaukie, and contained covenants that they were seized in fee of the lot, and had good right to convey the same. Whereas it was averred, that, in truth, they were not so seized, nor authorized to convey the premises, and that thereby Le Roy became liable to repay the \$1,800.

Under several instructions given by the Circuit Court for the Southern District of New York, where the suit was instituted, the jury found a verdict for the original plaintiff, on which judgment was rendered in his favor, and which the defendant now seeks to reverse by writ of error. Among those instructions, which were excepted to by the

¹ Arguments of counsel are omitted. — Ed.

² *Acc. Taft v. Ward*, 106 Mass. 518; *Henry Briggs Sons & Co. v. Niven* (Antwerp, 22 July, 1893), 21 Clunet, 1080. See *Carnegie v. Morrison*, 2 Met. 381. So of the question whether an assignee of a *chose in action* may sue in his own name. *Roosa v. Crist*, 17 Ill. 450; *Foss v. Nutting*, 14 Gray, 484; *Lodge v. Phelps*, 2 Cai. Cas. 321; see *Levy v. Levy*, 78 Pa. 507. Whether an assignee for creditors may sue in his own name. *Glenn v. Marbury*, 145 U. S. 499; *Osborn v. First Nat. Bank*, 175 Pa. 494, 34 Atl. 858. So of suit by a married woman in her own name. *Stoneman v. Erie Ry.*, 52 N. Y. 429. — Ed.

³ Part of the opinion only is given. — Ed.

defendant, and are at this time to be considered, was, first, that "the action of assumpsit is properly brought in this court, upon the promises of the defendant contained in the deed, if any promises are made therein which are binding or obligatory on the defendant."

The conveyance in this case was made in the State of Wisconsin, and a scrawl or ink seal was affixed to it, rather than a seal of wax or wafer. By the law of that State, it is provided, that "any instrument, to which the person making the same shall affix any device, by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed."

But in the State of New York it has been repeatedly held (as in *Warren v. Lynch*, 5 Johns. 239) that, by its laws, such device, without a wafer or wax, are not to be deemed a seal, and that the proper form of action must be such as is practised on an unsealed instrument in the State where the suit is instituted, and the latter must therefore be assumpsit. 12 Johns. 198; 2 Hill, 228, 544; 3 Hill, 493; 1 Denio, 376; 5 Johns. 329; *Andrews et al. v. Herriott*, 4 Cowen, 508, overruling *Meridith v. Hinsdale*, 2 Caines, 362; 4 Kent, 451; 8 Peters, 362; Story's Conflict of Laws, 47. A like doctrine prevails in some other States. 3 Gill & Johns. 234; *Douglas et al. v. Oldham*, 6 N. H. 150.

It becomes our duty, then, to consider the instruction given here, in an action brought in the Circuit Court of New York, as correct in relation to the form of the remedy. It was obliged to be in assumpsit in the State of New York, and one of the counts was special on the promise contained in the covenant. We hold this, too, without impairing at all the principle, that, in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the law of Wisconsin, as the *lex loci contractus*, must govern. *Robinson v. Campbell*, 8 Wheat. 212.¹

HAMILTON v. SCHOENBERGER.

SUPREME COURT OF IOWA. 1877.

[Reported 47 Iowa, 385.]

THE petitioner alleges that a judgment had been entered against him in the Benton District Court on a "judgment note," upon confession of judgment by an attorney of the court, not authorized to appear for him except by the power contained in the note; and asks that the judgment be declared void and cancelled. The defendants demurred to this petition. The demurrer was overruled, and judgment was rendered can-

¹ *Acc. Thrasher v. Everhart*, 3 G. & J. 234; *Broadhead v. Noyes*, 9 Mo. 55; *Andrews v. Herriott*, 4 Cow. 508. See *Williams v. Haines*, 27 Ia. 251. — Ed.

celling the judgment in favor of defendants against plaintiff. The defendants appeal.¹

DAY, C. J. So far as we are advised it has never been the understanding of the profession nor of the business community in this State that warrants of attorney to confess judgment had any place in our law. A confession of judgment pertains to the remedy. A party seeking to enforce here a contract made in another State must do so in accordance with the laws of this State. Parties cannot by contract made in another State engraft upon our procedure here remedies which our laws do not contemplate nor authorize.

We are fully satisfied that the demurrer to the petition was properly overruled. *Affirmed.*

MINERAL POINT RAILROAD CO. v. BARRON.

SUPREME COURT OF ILLINOIS. 1876.

[Reported 83 Illinois, 365.]

CRAIG, J.² Under the laws of Wisconsin, had the proceedings been instituted in that State, the wages of the defendant in the original action were exempt from garnishment, and it is urged by appellant, that, as the parties resided in that State and the debt was there incurred, the exemption laws of Wisconsin must control, although the proceedings for the collection of the debt were commenced in this State.

It is true, the validity of a contract is to be determined by the law of the place where it is made, but the law of the remedy is no part of the contract, as is well said by Parsons on Contracts, vol. 2, page 588: "But on the trial, and in respect to all questions as to the forms or methods, or conduct of process or remedy, the law of the place of the forum is applied."

In *Sherman v. Gassett*, 4 Gilman, 521, after referring to a number of cases in illustration of the rule, it is said: "The cases above referred to, although not precisely analogous, yet settle the principle that the *lex loci* only governs in ascertaining whether the contract is valid, and what the words of the contract mean. When the question is settled that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in framing it, the *lex loci* ceases, and the *lex fori* steps in and determines the time, the mode, and the extent of the remedy."

Statutes of limitations fixing the time within which an action may be brought, laws providing for a set-off in certain actions, and statutes providing that certain articles of personal property, wearing apparel,

¹ The statement of facts has been abridged, and part of the opinion omitted. — ED.

² Part of the opinion only is given. — ED.

farming implements, and the tools of a mechanic shall be exempt from levy and sale upon execution, have always, so far as our observation goes, been regarded by courts as regulations affecting the remedy which might be enacted by each State, as the judgment of the legislature might think for the best interests of the people thereof. *Bronson v. Kinzie*, 1 Howard, 311.

The statute of Wisconsin, under which appellant was not liable to be garnisheed, was a law affecting merely the remedy where an action should be brought in the courts of that State. That law, however, cannot be invoked where the remedy is sought to be enforced in the courts of this State. The remedy must be governed by the laws of the State where the action is instituted.¹

GIBBS v. HOWARD.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE. 1820.

[*Reported 2 New Hampshire, 296.*]

THIS was an action of assumpsit upon a note of hand, dated September 29, 1817, for \$57, made by Howard, and payable to Almon Burgess, or order, in the month of April, 1818; and on the 31st of October, 1817, indorsed by Burgess to Patience Cone, then sole, now the wife of Gibbs, the plaintiff.

The defendant pleaded the general issue, and gave notice of a set-off consisting of three notes of hand, made by Almon Burgess, and payable to three several persons, and by them indorsed to the defendant, November 1, 1817.

The cause was submitted to the decision of the court upon the following facts. The note described in the declaration was made by Howard, and at the time when made, the original parties to it were both inhabitants of the State of Vermont. The same note was for a valuable consideration indorsed to Patience Cone, then an inhabitant of Vermont, before it became due, and before the defendant had any inter-

¹ *Acc. Chic.*, *R. I. & P. Ry. v. Sturm*, 174 U. S. 170; *Boykin v. Edwards*, 21 Ala. 261; *Broadstreet v. Clark*, 65 Ia. 670; *B. & M. R. R. v. Thompson*, 31 Kan. 180, 1 Pac. 622; *Morgan v. Neville*, 74 Pa. 52. But see *Mo. P. Ry. v. Sharitt*, 48 Kan. 385, 23 Pac. 430; *Drake v. L. S. & M. S. Ry.*, 69 Mich. 168, 179, 37 N. W. 70. In the last case, *Morse, J.*, said: "It must be held, I think, not only as a matter of simple justice, but as sound law, which means justice, that where the creditor, debtor, and garnishee, at the time of the creation of both debts, are all residents and doing business in Indiana, and both debts are created, and intended to be payable, in that State, the exemption of wages is such an incident and condition of the debt from the employer that it will follow the debt, if the debt follows the person of the garnishee into Michigan, and attach itself to every process of collection in this State, unless jurisdiction is obtained over the person of the principal debtor; that it becomes a vested right *in rem*, which follows the debt into any jurisdiction where the debt may be considered as going. — *Ed.*

est in the notes mentioned in the set-off. Gibbs is an inhabitant of Massachusetts. There is a statute of Vermont, passed on the 31st October, 1798, by which it is enacted, "that in all actions on indorsed notes it shall be lawful for the defendant to plead an offset of all demands proper to be plead in offset which the defendant may have against the original payee, before notice of such an indorsement against the indorsee, and may also plead or give in evidence on the trial of any such action, any matter or thing which would equitably discharge the defendant in an action brought in the name of the original payee."

And it was agreed, that if the court should be of opinion that the defendant could not avail himself of the set-off filed in the case, judgment should be rendered for the plaintiffs for the amount of the note described in the declaration.

By THE COURT. It is very clear that the notes, which the defendant holds against Burgess, are not a legal set-off in this action by the laws of this State; and it is equally clear, that we can take no notice of the statute of Vermont. The *lex loci* must settle the nature, validity, and interpretation of contracts, but it extends no further. The laws of the State in which contracts are attempted to be enforced, must settle what is the proper course of judicial proceedings to enforce them. The statute of Vermont relates merely to the remedy, by which a contract may be enforced. There must, therefore, according to the agreement of the parties, be

*Judgment for the plaintiff.*¹

TOWNSEND v. JEMISON.

SUPREME COURT OF THE UNITED STATES. 1849.

[Reported 9 *Howard's Reports*, 407.]

WAYNE, J.² This suit has been brought here from the District Court of the United States for the Middle District of Alabama. The defendant in the court below, the plaintiff here, besides other pleas, pleaded that the cause of action accrued in Mississippi more than three years before the suit was brought; and that the Mississippi statute of limitations barred a recovery in the District Court of Alabama. The plaintiff demurred to the plea. The court sustained the demurrer.

We do not think it necessary to do more than to decide this point in the case.

The rule in the courts of the United States, in respect to pleas of the statutes of limitation, has always been, that they strictly affect the

¹ *Acc. Meyer v. Dresser*, 16 C. B. N. S. 646 (*semble*); *Savery v. Savery*, 3 Ia. 271; *Davis v. Morton*, 5 Bush, 180. — Ed.

² The opinion only is given; it sufficiently states the case. — Ed.

remedy, and not the merits. In the case of *McElmoyle v. Cohen*, 13 Peters, 312, this point was raised, and so decided. All of the judges were present and assented. The fullest examination was then made of all the authorities upon the subject, in connection with the diversities of opinion among jurists about it, and of all those considerations which have induced legislatures to interfere and place a limitation upon the bringing of actions.

We thought then, and still think, that it has become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought, — the *lex fori*; otherwise the suit would be barred, unless the plaintiff can bring himself within one of the exceptions of the statute, if that is pleaded by the defendant. This rule is as fully recognized in foreign jurisprudence as it is in the common law. We then referred to authorities in the common law, and to a summary of them in foreign jurisprudence. Burge's *Com. on Col. and For. Laws*. They were subsequently cited, with others besides, in the second edition of the *Conflict of Laws*, 483. Among them will be found the case of *Leroy v. Crowninshield*, 2 Mason, 151, so much relied upon by the counsel in this case.

Neither the learned examination made in that case of the reasoning of jurists, nor the final conclusion of the judge, in opposition to his own inclinations, escaped our attention. Indeed, he was here to review them, with those of us now in the court who had the happiness and benefit of being associated with him. He did so with the same sense of judicial obligation for the maxim, *Stare decisis et non quieta movere*, which marked his official career. His language in the case in Mason fully illustrates it: "But I do not sit here to consider what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and juridical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides in whose judgment the most implicit confidence might not have been originally reposed." Then follows this declaration: "It does appear to me that the question now before the court has been settled, so far as it could be, by authorities which the court is bound to respect." The error, if any has been committed, is too strongly engrafted into the law to be removed without the interposition of some superior authority. Then, in support of this declaration, he cites Huberus, Voet, Pothier, and Lord Kames, and adjudications from English and American courts, to show that, whatever may have been the differences of opinion among jurists, the uniform administration of the law has been, that the *lex loci contractus* expounds the obligation of contracts, and that statutes of limitation prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertain *ad tempus et modum actionis instituendæ* and not *ad valorem contractus*. Williams v.

Jones, 13 East, 439; Nash v. Tupper, 1 Caines, 402; Ruggles v. Keeler, 3 Johns. 263; Pearsall v. Dwight, 2 Mass. 84; Decouche v. Savetier, 3 Johns. Ch. 190, 218; McCluney v. Silliman, 3 Peters, 276; Hawkins v. Barney, 5 Peters, 457; Bank of the United States v. Donnally, 8 Peters, 361; McElmoyle v. Cohen, 13 Peters, 312.

There is nothing in *Shelby v. Guy*, 11 Wheaton, 361, in conflict with what this court decided in the four last-mentioned cases. Its action upon the point has been uniform and decisive. In cases before and since decided in England, it will be found there has been no fluctuation in the rule in the courts there. The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* cannot be. 2 Bingham, New Cases, 202, 211; *Don v. Lippman*, 5 Clark & Fin. 1, 16, 17. It has become, as we have already said, a fixed rule of the *jus gentium privatum*, unalterable, in our opinion, either in England or in the States of the United States, except by legislative enactment.

We will not enter at large into the learning and philosophy of the question. We remember the caution given by Lord Stair in the supplement to his *Institutes* (p. 852), about citing as authorities the works and publications of foreign jurists. It is appropriate to the occasion, having been written to correct a mistake of Lord Tenterden, to whom no praise could be given which would not be deserved by his equally distinguished contemporary, Judge Story. Lord Stair says: "There is in *Abbott's Law of Shipping* (5th edition, p. 365) a singular mistake; and, considering the justly eminent character of the learned author for extensive, sound, and practical knowledge of the English law, one which ought to operate as a lesson on this side of the Tweed, as well as on the other, to be a little cautious in citing the works and publications of foreign jurists, since, to comprehend their bearings, such a knowledge of the foreign law as is scarcely attainable is absolutely requisite. It is magnificent to array authorities, but somewhat humiliating to be detected in errors concerning them; — yet how can errors be avoided in such a case, when every day's experience warns us of the prodigious study necessary to the attainment of proficiency in our own law? My object in adverting to the mistake in the work referred to is, not to depreciate the author, for whom I entertain unfeigned respect, but to show that, since even so justly distinguished a lawyer fails when he travels beyond the limits of his own code, the attempt must be infinitely hazardous with others."

We will now venture to suggest the causes which misled the learned judge in *Leroy v. Crowninshield* into a conclusion, that, if the question before him had been entirely new, his inclination would strongly lead him to declare, that where all remedies are barred or discharged by the *lex loci contractus*, and have operated upon the case, then the bar may be pleaded in a foreign tribunal, to repel any suit brought to enforce the debt.

We remark, first, that only a few of the civilians who have written upon the point differ from the rule, that statutes of limitation relate to the remedy and not to the contract. If there is any case, either in our own or the English courts, in which the point is more discussed than it is in *Leroy v. Crowninshield* we are not acquainted with it. In every case but one, either in England or in the United States, in which the point has since been made, that case has been mentioned, and it has carried some of our own judges to a result which Judge Story himself did not venture to support.

We do not find him pressing his argument in *Leroy v. Crowninshield* in the *Conflict of Laws*, in which it might have been appropriately done, if his doubts, for so he calls them, had not been removed. Twenty years had then passed between them. In all that time, when so much had been added to his learning, really great before, that by common consent he was estimated in jurisprudence *par summis*, we find him, in the *Conflict of Laws*, stating the law upon the point in opposition to his former doubts, not in deference to authority alone, but from declared conviction.

The point had been examined by him in *Leroy v. Crowninshield* without any consideration of other admitted maxims of international jurisprudence, having a direct bearing upon the subject. Among others, that the obligation of every law is confined to the State in which it is established, that it can only attach upon those who are its subjects, and upon others who are within the territorial jurisdiction of the State; that debtors can only be sued in the courts of the jurisdiction where they are; that all courts must judge in respect to remedies from their own laws, except when conventionally, or from the decisions of courts, a comity has been established between States to enforce in the courts of each a particular law or principle. When there is no positive rule, affirming, denying, or restraining the operation of foreign laws, courts establish a comity for such as are not repugnant to the policy or in conflict with the laws of the State from which they derive their organization. We are not aware, except as it has been brought to our notice by two cases cited in the argument of this cause, that it has ever been done, either to give or to take away remedies from suitors, when there is a law of the State where the suit is brought which regulates remedies. But for the foundation of comity, the manner of its exercise, and the extent to which courts can allowably carry it, we refer to the case of the *Bank of Augusta v. Earle*, 13 Peters, 519, 589; *Conflict of Laws, Comity*.

From what has just been said, it must be seen, when it is claimed that statutes of limitation operate to extinguish a contract, and for that reason the statute of the State in which the contract was made may be pleaded in a foreign court, that it is a point not standing alone, disconnected from other received maxims of international jurisprudence. And it may well be asked, before it is determined otherwise, whether contracts by force of the different statutes of limitations in States are

not exceptions from the general rule of the *lex loci contractus*. There are such exceptions for dissolving and discharging contracts out of the jurisdiction in which they were made. The limitations of remedies, and the forms and modes of suit, make such an exception. Conf. of Laws, 271, and 524 to 527. We may then infer that the doubts expressed in *Leroy v. Crowninshield* would have been withheld if the point had been considered in the connection we have mentioned.

We have found, too, that several of the civilians who wrote upon the question did so without having kept in mind the difference between the positive and negative prescription of the civil law. In doing so, some of them — not regarding the latter in its more extended signification as including all those bars or exceptions of law or of fact which may be opposed to the prosecution of a claim, as well out of the jurisdiction in which a contract was made as in it — were led to the conclusion, that the prescription was a part of the contract, and not the denial of a remedy for its enforcement. It may be as well here to state the difference between the two prescriptions in the civil law. Positive, or the Roman *usucaptio*, is the acquisition of property, real or personal, immovable or movable, by the continued possession of the acquirer for such a time as is described by the law to be sufficient. Erskine's Inst. 556. "*Adjectio dominii per continuationem possessionis temporis legi definiti.*" Dig. 8.

Negative prescription is the loss or forfeiture of a right by the proprietor's neglecting to exercise or prosecute it during the whole period which the law hath declared to be sufficient to infer the loss of it. It includes the former, and applies also to all those demands which are the subject of personal actions. Erskine's Inst. 560, and 3 Burge, 26.

Most of the civilians, however, did not lose sight of the differences between these prescriptions, and if their reasons for doing so had been taken as a guide, instead of some expressions used by them, in respect to what may be presumed as to the extinction or payment of a claim, while the plea in bar is pending, we do not think that any doubt would have been expressed concerning the correctness of their other conclusion, that statutes of limitation in suits upon contracts only relate to the remedy. But that was not done, and, from some expressions of Pothier and Lord Kames, it was said, "If the statute of limitations does create, *proprio vigore*, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why the presumption of such payment, thus arising from the *lex loci contractus*, should not be as conclusive in every other place as in the place of the contract." And that was said in *Leroy v. Crowninshield*, in opposition to the declaration of both of those writers, that in any other place than that of the contract such a presumption could not be made to defeat a law providing for proceedings upon suits. Here, turning aside for an instant from our main purpose, we find the beginning or source of those constructions of the English statutes of limitation which almost made them useless for the accomplishment of their end.

Within a few years, the abuses of such constructions have been much corrected, and we are now, in the English and American courts, nearer to the legislative intent of such enactments.

But neither Pothier nor Lord Kames meant to be understood, that the theory of statutes of limitation purported to afford positive presumptions of payment and extinction of contracts, according to the laws of the place where they are made. The extract which was made from Pothier shows his meaning is, that, when the statute of limitations has been pleaded by a defendant, the presumption is in his favor that he has extinguished and discharged his contract, until the plaintiff overcomes it by proof that he is within one of those exceptions of the statute which takes it out of the time after which he cannot bring a suit to enforce judicially the obligation of the defendant. The extract from Lord Kames only shows what may be done in Scotland when a process has been brought for payment of an English debt, after the English prescription has taken place. The English statute cannot be pleaded in Scotland in such a case, but, according to the law of that forum, it may be pleaded that the debt is presumed to have been paid. And it makes an issue, in which the plaintiff in the suit may show that such a presumption does not apply to his demand; and that without any regard to the prescription of time in the English statute of limitation. It is upon this presumption of payment that the conclusion in *Leroy v. Crowninshield* was reached, and as it is now universally admitted that it is not a correct theory for the administration of statutes of limitation, we may say it was in fact because that theory was assumed in that case that doubts in it were expressed, contrary to the judgment which was given, in submission to what was admitted to be the law of the case. What we have said may serve a good purpose. It is pertinent to the point raised by the pleading in the case before us, and in our judgment there is no error in the District Court's having sustained the demurrer.

Before concluding, we will remark that nothing has been said in this case at all in conflict with what was said by this court in *Shelby v. Guy*, 11 Wheaton, 361. The distinctions made by us here between statutes giving a right to property from possession for a certain time, and such as only take away remedies for the recovery of property after a certain time has passed, confirm it. In *Shelby v. Guy* this court declared that, as by the laws of Virginia five years' *bona fide* possession of a slave constitutes a good title upon which the possessor may recover in detinue, such a title may be set up by the vendee of such possessor in the courts of Tennessee as a defence to a suit brought by a third party in those courts. The same had been previously ruled in this court in *Brent v. Chapman*, 5 Cranch, 358; and it is the rule in all cases where it is declared by statute that all rights to debts due more than a prescribed term of years shall be deemed extinguished, and that all titles to real and personal property not pressed within the prescribed time shall give ownership to an adverse possessor. Such a law, though

one of limitation, goes directly to the extinguishment of the debt, claim, or right, and is not a bar to the remedy. *Lincoln v. Battelle*, 6 Wend. 475; *Confl. of Laws*, 582.

In *Lincoln v. Battelle*, 6 Wend. 475, the same doctrine was held. It is stated in the *Conflict of Laws*, 582, to be a settled point. The courts of Louisiana act upon it. We could cite other instances in which it has been announced in American courts of the last resort. In the cases of *De la Vega v. Vianna*, 1 Barn. & Adol. 284, and the *British Linen Company v. Drummond*, 10 Barn. & Cres. 903, it is said that, if a French bill of exchange is sued in England, it must be sued on according to the laws of England, and there the English statute of limitations would form a bar to the demand if the bill had been due for more than six years. In the case of *Don v. Lippman*, 5 Clark & Fin. 1, it was admitted by the very learned counsel who argued that case for the defendants in error, that, though the law for expounding a contract was the law of the place in which it was made, the remedy for enforcing it must be the law of the place in which it is sued. In that case will be found, in the argument of Lord Brougham before the House of Lords, his declaration of the same doctrine, sustained by very cogent reasoning, drawn from what is the actual intent of the parties to a contract when it is made, and from the inconveniences of pursuing a different course. In *Beckford and others v. Wade*, 17 Vesey, 87, Sir William Grant, acknowledging the rule, makes the distinction between statutes merely barring the legal remedy and such as prohibit a suit from being brought after a specified time. It was a case arising under the possessory law of Jamaica, which converts a possession for seven years under a deed, will, or other conveyance, into a positive absolute title, against all the world,—without exceptions in favor of any one or any right, however a party may have been situated during that time, or whatever his previous right of property may have been. There is a statute of the same kind in Rhode Island. 2 R. I. Laws, 363, 364, ed. 1822. In Tennessee there is an act in some respects similar to the possessory law of Jamaica; it gives an indefeasible title in fee simple to lands of which a person has had possession for seven years, excepting only from its operation infants, feme covert, *non compos mentis*, persons imprisoned or beyond the limits of the United States and the territories thereof, and the heirs of the excepted, provided they bring actions within three years after they have a right to sue. Act of November 16, 1817, ch. 28, §§ 1, 2. So in North Carolina there is a provision in the act of 1715, ch. 17, § 2, with the same exceptions as in the act of Tennessee, the latter being probably copied substantially from the former. Thirty years' possession in Louisiana prescribes land, though possessed without title and *malâ fide*.

We have mentioned those acts in our own States only for the purpose of showing the difference between statutes giving title from possession, and such as only limit the bringing of suits. It not unfrequently happens in legislation that such sections are found in statutes for the

limitation of actions. It is, in fact, because they have been overlooked that the distinction between them has not been recognized as much as it ought to have been, in the discussion of the point whether a certain time assigned by a statute, within which an action must be brought, is a part of the contract, or solely the remedy. The rule in such a case is, that the obligations of the contract upon the parties to it, except in well-known cases, are to be expounded by the *lex loci contractus*. Suits brought to enforce contracts, either in the State where they were made or in the courts of other States, are subject to the remedies of the forum in which the suit is, including that of statutes of limitation.

*Judgment affirmed.*¹

THE HARRISBURG.

SUPREME COURT OF THE UNITED STATES. 1886.

[Reported 119 *United States*, 199.]

This is a suit *in rem* begun in the District Court of the United States for the Eastern District of Pennsylvania, on the 25th of February, 1882, against the steamer "Harrisburg," by the widow and child of Silas E. Rickards, deceased, to recover damages for his death caused by the negligence of the steamer in a collision with the schooner "Marietta Tilton," on the 16th of May, 1877, about one hundred yards from the Cross Rip Light Ship, in a sound of the sea embraced between the coast of Massachusetts and the Islands of Martha's Vineyard and Nantucket, parts of the State of Massachusetts. The steamer was engaged at the time of the collision in the coasting trade, and belonged to the port of Philadelphia, where she was duly enrolled according to the laws of the United States. The deceased was first officer of the schooner, and a resident of Delaware, where his widow and child also resided when the suit was begun.

The statutes of Pennsylvania in force at the time of the collision provided that, "whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life," "the husband, widow, children, or parents of the deceased, and no other relative," "may maintain an action for and recover damages for the death thus occasioned." "The action shall be brought within one year after the death, and not thereafter." Brightly's Purdon's Dig. 11th ed., 1267, §§ 3, 4, 5; Act of April 15, 1851, § 18; Act of April 6, 1855, §§ 1, 2.

¹ *Acc. Don v. Lippman*, 5 Cl. & Fin. 1; *Alliance Bank v. Carey*, 5 C. P. D. 429; *Bank of U. S. v. Donnally*, 8 Pet. 361; *Burgett v. Williford*, 56 Ark. 187, 19 S. W. 750; *Atwater v. Townsend*, 4 Conn. 47; *Collins v. Manville*, 170 Ill. 614, 48 N. E. 914; *Labatt v. Smith*, 83 Ky. 599; *Pearsall v. Dwight*, 2 Mass. 84; *Perkins v. Guy*, 55 Miss. 153; *Carson v. Hunter*, 46 Mo. 467; *Warren v. Lynch*, 5 Johns. 239; *Watson v. Brewster*, 1 Barr. 381. — Ed.

By a statute of Massachusetts relating to railroad corporations, it was provided that "if, by reason of the negligence or carelessness of a corporation, or of the unfitness or gross negligence of its servants or agents while engaged in its business, the life of any person, being in the exercise of due diligence, . . . is lost, the corporation shall be punished by a fine not exceeding five thousand nor less than five hundred dollars, to be recovered by indictment and paid to the executor or administrator for the use of the widow and children." . . . "Indictments against corporations for loss of life shall be prosecuted within one year from the injury causing the death." Mass. Gen. Sts. 1860, c. 63, §§ 97-99; Stat. 1874, c. 372, § 163.¹

WAITE, C. J. We are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with a right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown. As to this, it only appears that the wrong was done in May, 1877, and that the suit was not brought until February, 1882, while the law required it to be brought within a year.

*The decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the libel.*²

¹ Only so much of the case as involves the question of limitation of time is given. Arguments of counsel are omitted. — Ed.

² See *Brunswick Terminal Co. v. Bank*, 99 Fed. 635. — Ed.

HOADLEY v. NORTHERN TRANSPORTATION CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1874.

[Reported 115 *Massachusetts*, 304.]

COLT, J.¹ The plaintiff seeks to recover in tort against the defendant as a common carrier for the loss of a steam-engine which it had undertaken to transport from Chicago, Illinois, and deliver to him at Lawrence in this State. The engine was destroyed at Chicago in the great fire of 1871, and one question at the trial was, whether by the terms of the contract of transportation the defendant was liable for this loss.

The plaintiff put in the bill of lading received by his agent at Chicago of the defendant at the time the property was delivered for transportation. It is in the usual form, and the terms and conditions are expressed in the body of the paper in a way not calculated to escape attention. In one clause it exempts the defendant from all liability for loss or damage by fire; in another from all liability "for loss or damage on any article or property whatever by fire while in transit or while in depots or warehouses or places of transshipment," and further provides that the delivery of the bill of lading shall be conclusive evidence of assent to its terms.

It was assumed by both parties as now settled that a common carrier may by special contract avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire occurring without his own fault. Such is the declared law of this Commonwealth, and the Illinois cases produced at the trial assume that the same rule prevails there. An express contract, once established, is in both States effectual to limit the carrier's liability. But the plaintiff contended that by the law of Illinois, as declared in the courts of that State, the mere receipt, without objection, of a bill of lading which limits the carrier's common law liability for loss by fire, would not raise a presumption that its terms were assented to, but such assent, if relied on, must be shown by other and additional evidence. The jury have found this to be the law of that State, under instructions not objected to, and we are not required to say whether there was sufficient evidence to warrant the finding. *Adams Express Company v. Haynes*, 42 Ill. 89; *American Express Company v. Schier*, 55 Ill. 140, 150; *Illinois Central Railroad v. Frankenberg*, 54 Ill. 88, 98. The court ruled that this law of Illinois must govern the case, and that under it the jury could not find that the mere receipt of the bill of lading would be evidence of assent to its terms.

The law of this Commonwealth differs from the law of Illinois as thus found. In *Grace v. Adams*, 100 Mass. 505, decided by this court on an agreed statement of facts, it was held that a bill of lading or shipping receipt, taken by a consignor without dissent at the time of the delivery of the property for transportation, by the terms of which the carrier stipulates against such liability, would exempt the carrier when

¹ Part of the opinion only is given. — Ed.

the loss was not caused by his own negligence, on the ground that such acceptance would authorize him to infer assent, and amount to evidence of the contract between the parties. The defendant contends that the case is to be tried by the law of this Commonwealth.

It is a general rule that personal contracts must have the same interpretation and binding force in all countries which they have in the place where made. The contract is presumed to have been entered into with reference to the law of that place. If formalities and solemnities are there required to give validity to it, the requirement must be shown to have been observed. But the law of the place where the action is brought, by the same general rule, regulates the remedy and all the incidents of the remedy upon it. The law of the former place determines the right; the law of the latter controls the admission of evidence and prescribes the modes of proof by which the terms of the contract are made known to the court, as well as the form of the action by which it is enforced. Thus in a suit in Connecticut against the indorser on a note made and indorsed in New York, it was held that parol evidence of a special agreement different from that implied by law would be received in defence, although by the law of the latter State no agreement different from that which the law implies from a blank indorsement could be proved by parol. *Downer v. Chesebrough*, 36 Conn. 39. And upon the same principle it has been held that a contract valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails unless it is put in writing as required. *Leroux v. Brown*, 12 C. B. 801. So *assumpsit* was held to lie in New York on an undertaking in Wisconsin contained in a writing having a scrawl and no seal affixed to the defendant's name, although in the latter State it had in pleadings and in evidence the effect of a seal. *Le Roy v. Beard*, 8 How. 451. The statute of limitations for the same reasons affects only the remedy, and has no extra-territorial force.

It is not always indeed easy to determine whether the rule of law sought to be applied touches the validity of the contract or only the remedy upon it. In the opinion of the court, the rule of law laid down in Illinois and here relied on by the plaintiff affects the remedy only, and ought not to control the courts of this Commonwealth. The nature and validity of the special contract set up is the same in both States. It is only a difference in the mode of proof. A presumption of fact in one State is held legally sufficient to prove assent to the special contract relied on to support the defence. In the other State it is held not to be sufficient. It is as if proof of the contract depended upon the testimony of a witness competent in one place and incompetent in the other. The instructions given at the trial upon this point did not conform to the view of the law above stated, in which, upon more full consideration, we all concur.

*Exceptions sustained.*¹

¹ *Acc.* *Johnson v. C. & N. W. Ry.*, 91 Ia. 248, 59 N. W. 66. *Contra*, *Tenuconi v. Terzaghi* (Turin Cass. 7 July, 1887), 15 Clunet, 426. *LORD BROUGHAM* in *Bain v.*

PECK v. MAYO.

SUPREME COURT, VERMONT. 1842.

[Reported 14 Vermont, 33.]

REDFIELD, J.¹ This action is upon a promissory note, made in Montreal, where the legal rate of interest is six per cent, payable at the M. & F.'s bank, in the city of Albany, where the legal rate of interest is seven per cent, and indorsed by the defendants in this State, where the legal rate of interest is six per cent. This action being against the defendants, as indorsers, the only question is, what rate of interest are they liable for? The note was payable at a day certain, but no interest stipulated in the contract. The interest claimed is for damages in not paying the money when due.

The first question naturally arising in this case is, what rate of interest, by way of damages, are the signers liable for? There are fewer decisions to be found in the books, bearing directly upon this subject, than one would naturally have expected. It is an elementary principle, upon this subject, that all the incidents pertaining to the validity and construction, and especially to the discharge, performance, or satisfaction of contracts, and the rule of damages for a failure to perform such contract, will be governed by the *lex loci contractus*. This term, as is well remarked by Mr. Justice Story, in his Conflict of Laws, 248, may have a double meaning or aspect; and that it may indifferently indicate the place where the contract is actually made, or that where it is virtually made, according to the intent of the parties, that is, the place of performance. The general rule now is, I apprehend, that the latter is the governing law of the contract. Hence the elementary principle undoubtedly is that the rate of interest, whether stipulated in the contract or given by way of damages for the non-performance, is the interest of the place of payment.

We will next examine whether any positive rule of law has been established contravening this principle. 2 Kent Com. 460, 461. Chancellor Kent expressly declares that this elementary principle is now the "received doctrine at Westminster Hall," and cites *Thompson v.*

Whitehaven, &c. Ry., 3 H. L. C. 1, 19, said: "The law of evidence is the *lex fori* which governs the courts. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not: This is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it."

So if a stamp is required for admitting any document in evidence, even a foreign document must be stamped before it will be admitted; while a document valid but inadmissible, under this rule, where made, may be admitted in another State not requiring a stamp. *Bristow v. Sequeville*, 5 Ex. 275; *Fant v. Miller*, 17 Grat. 47; *Murdock v. Roebuck*, 1 Juta (Cape Colony), 1; *Dearsley v. Rennels* (Ghent, 7 Dec. 1876), 5 Clunet, 509.—Ed.

¹ Part of the opinion only is given.—Ed.

Powles, 2 Simons' R. 194 (2 Cond. Ch. R. 378). This case does not necessarily decide this point, but the opinion of the Vice Chancellor expressly recognizes the rule, that, although the rate of interest stipulated is above the English interest, still the contract will not be usurious, unless it appear to be a contract made in England and there to be performed. The case of *Harvey v. Archbold*, 1 Ryan & Moody, 184 (21 Eng. C. L. 729), recognizes more expressly the same doctrine. The case of *Depau v. Humphreys*, 8 Martin, 1, expressly decides, that a contract made in one country, to be performed in another, where the rate of interest is higher than at the place of entering into the contract, it may stipulate the higher rate of interest. Mr. Justice Story recognizes the elementary rule, above alluded to, as the settled law. Conflict of Laws, 243, 246. Similar language is adopted by Mr. Justice Thompson, *Boyce v. Edwards*, 4 Peters' R. 111, and by Mr. Chief Justice Taney, in *Andrews v. Pond*, 13 Peters, 65, and by Chancellor Walworth, in *Hosford v. Nichols*, 1 Paige, 220. Much the same is said by the court in the case of the *Bank of the U. S. v. Daniel*, 12 Peters, 32. In many of these cases the question alluded to was not directly before the court, but, by all these eminent jurists, it seems to have been considered as one of the long settled principles of the law of contract. The same rule of damages was, in the case of *Ekins v. the East India Company*, 1 P. Wms. 395, applied to the tortious conversion of a ship in Calcutta, the court making the company liable for the value of the ship, at the time of conversion, and the India rate of interest for the delay of the payment of the money. In this case the interest allowed was greater than the English interest.

When the contract is entered into in one country, to be performed in another, having established a lower rate of interest than the former, and the contract stipulates interest generally, it has always been held that the rate of interest recoverable was that of the place of performance only. It is expressly so decided in *Robinson v. Bland*, 2 Burrow, 1077; *Fanning v. Consequa*, 17 Johns. 511; *Schofield v. Day*, 20 Johns. R. 102.

From all which I consider the following rules, in regard to interest on contracts, made in one country to be executed in another, to be well settled: 1. If a contract be entered into in one place to be performed in another, and the rate of interest differ in the two countries, the parties may stipulate for the rate of interest of either country, and thus by their own express contract, determine with reference to the law of which country that incident of the contract shall be decided. 2. If the contract, so entered into, stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear the parties intended to contract with reference to the law of the other place. 3. If the contract be so entered into, for money, payable at a place on a day certain, and no interest be stipulated, and payment be delayed, interest, by way of damages, shall be allowed according to the law of the place of payment, where the money may be supposed to have been

required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occurring, and to have paid the rate of interest of that country. This is expressly recognized as the settled rule of law, in regard to the acceptor of a bill, who stands in the place of the maker of these notes. 3 Kent's Com. 116.¹

AYER v. TILDEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1860.

[Reported 15 Gray, 178.]

ACTION of contract upon this promissory note, made and indorsed by the defendants: "\$670.81. New Lebanon, 20th June, 1857. Six months after date we promise to pay to the order of ourselves six hundred and seventy dollars and eighty-one cents, value received, at Bank of America, N. Y. Tilden & Co."

The parties stated the following case, upon which the Superior Court in Middlesex gave judgment for the defendants, and the plaintiffs appealed.²

HOAR, J. The plaintiffs are entitled to recover, according to the agreement of parties, the principal of the note, with interest at such a rate as the law will allow. That rate will be six per cent from the maturity of the note. The interest is not a sum due by the contract, for by the contract no interest was payable, and is not therefore affected by the law of the place of contract. It is given as damages for the breach of contract, and must follow the rule in force within the jurisdiction where the judgment is recovered. *Grimshaw v. Bender*, 6 Mass. 157; *Eaton v. Mellus*, 7 Gray, 566; *Barringer v. King*, 5 Gray, 12. The contrary rule has been held to be applicable where there was an express or implied agreement to pay interest. *Winthrop v. Carleton*, 12 Mass. 4; *Von Hemert v. Porter*, 11 Met. 220; *Lanusse v. Barker*, 3 Wheat. 147.

Perhaps it would be difficult to support the decision in *Winthrop v. Carleton* upon any sound principle; because the court in that case held that interest could only be computed from the date of the writ, thus clearly showing that it was not considered as due by the contract, and yet adopted the rate of interest allowed at the place of the contract. But the error would seem to be in not treating money, paid at the implied request of another, as entitled to draw interest from the time of payment.

¹ *Acc. Gibbs v. Fremont*, 9 Ex. 25; *Ex parte Heidelback*, 2 Low. 526; *Ballister v. Hamilton*, 3 La. Ann. 401; *Fanning v. Consequa*, 17 Johns. 511; *Raymond v. Messier* (French Cass. 9 June, 1880), 7 Clunet, 394.—Ed.

² Only so much of the case as deals with the rate of interest is given.—Ed.

An objection to adopting the rule of the rate of interest in the jurisdiction where the action is brought as the measure of damages may be worthy of notice, that this rule would allow the creditor to wait until he could find his debtor or his property within a jurisdiction where a much higher rate of interest was allowed than at the place of the contract. But a debtor could always avoid this danger by performing his contract; and the same difficulty exists in relation to the actions of trover and replevin.

If such a case should arise, it might with more reason be argued that the damages should not be allowed to exceed those which would have been recovered in the State where the contract was made and to be performed.¹

COMMERCIAL NATIONAL BANK *v.* DAVIDSON.

SUPREME COURT OF OREGON. 1889.

[*Reported 18 Oregon, 57.*]

THAYER, C. J.² . . . It is stipulated in the note to the effect that if it is not paid at maturity the makers will pay ten per cent additional as costs of collection. . . . It is my opinion that a clause in a promissory note, in the form of the stipulation in question, is not valid, and should not be enforced. . . .

Counsel for the respondent insists that the stipulation to pay the additional sum contained in the note in suit was valid and binding in the Territory where the note was executed, and that therefore it should be upheld in this State. As a general rule, the law of the place where contracts merely personal are made, governs as to their nature, obligation, and construction. But I do not think that rule applies to an agreement, the obligation of which does not arise until a remedy is sought upon the contract, to which it is only auxiliary. In regard to such agreements, the law of the place where they are attempted to be

¹ See *Kopelke v. Kopelke*, 112 Ind. 435.

In *Meyer v. Estes*, 164 Mass. 457, 465, FIELD, C. J., said: "In determining the measure of damages the first question is whether the contract is to be governed by the law of Massachusetts or by the law of the kingdom of Saxony. We think that it is to be governed by the law of Massachusetts. The contract was signed in Massachusetts and sent to the plaintiff at Leipzig, Saxony; it did not become a contract until the plaintiff accepted it and notified the defendants of such acceptance, which he did by telegram sent to them at Boston. *Lewis v. Browning*, 130 Mass. 173; *Pine v. Smith*, 11 Gray, 38; *Hill v. Chase*, 143 Mass. 129. The contract relates to what is to be done by the defendants in the United States of America; the defendants are described as 'of Boston, Mass., U. S. A.,' and the date of the contract is Boston. We think that it must be regarded as a contract to be performed in Massachusetts, and that the law of Massachusetts, which is also the law of the forum, must determine the damages to be recovered in the action." — ED.

² Only so much of the opinion as deals with the question of costs is given. — ED.

enforced, I should suppose, would prevail. This agreement was to pay the additional percentage as costs for collection of the note, and if the courts where the note was executed would have enforced the agreement, it does not follow that the courts of another jurisdiction are bound to do so. The effect of the agreement was to provide for an increase of costs, which are only incidental to the judgment, and the allowance of which must necessarily depend upon the law of the forum. A stipulation in a note made in Utah Territory, providing that in an action on the note the plaintiff, in case of a recovery, should be entitled to double costs, might be considered valid under the laws of that Territory, and enforceable in its courts; but that certainly would not render it incumbent upon the courts of this State, in an action upon such note, to award double costs.¹

¹ *Acc. Security Co. v. Eyer*, 36 Neb. 507, 54 N. W. 838. — ED.

PART III. — THE CREATION OF RIGHTS.

CHAPTER VI. — PERSONAL RIGHTS.

SECTION I. — CAPACITY.

MALE v. ROBERTS.

NISI PRIUS, IN THE COMMON PLEAS. 1800.

[*Reported 3 'Espinasse, 163.*]

ASSUMPSIT for money paid, laid out, and expended, to the use of the defendant; money lent and advanced, with the other common money counts.

Plea of the general issue.

The case, as opened by the plaintiff's counsel, was, that the plaintiff and the defendant were performers at the Royal Circus. While the company were performing at Edinburgh, in Scotland, the defendant had become indebted to one Cockburn, for liquors of different sorts, with which Cockburn had furnished him; not having discharged the debt, and it being suspected that the defendant was about to leave Scotland, Cockburn arrested him, by what is there termed a Writ of Fugé, the object of which is to prevent the debtor from absconding.

The defendant being then unable to pay the money, the plaintiff paid it for him; and he was liberated. The present action was brought to recover the money so paid, as money paid to his use.

The defence relied upon was, that the defendant was an infant when the money was so advanced.

LORD ELDON. It appears from the evidence in this cause, that the cause of action arose in Scotland; the contract must be therefore governed by the laws of that country where the contract arises. Would infancy be a good defence by the law of Scotland, had the action been commenced there?

Best, Sergeant, for the defendant, contended, that the contract was to be governed by the laws of England; in which case, the plaintiff could recover for necessities only. That at all events it should not be presumed that the laws were different; and as it appeared that the debt did not accrue for necessities, the plaintiff could neither recover on the counts for money paid, or for money lent to an infant.

LORD ELDON. What the law of Scotland is with respect to the right of recovering against an infant for necessities, I cannot say; but if the law of Scotland is, that such a contract as the present could not be enforced against an infant, that should have been given in evidence; and I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The

law of the country where the contract arose, must govern the contract; and what that law is, should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is, without evidence.

The plaintiff failed in proving his case, and was nonsuited.¹

COOPER v. COOPER.

HOUSE OF LORDS (SCOTCH APPEAL). 1888.

[Reported 13 Appeal Cases, 88.]

LORD HALSBURY, L. C.² My Lords, in this case the appellant, the widow of a domiciled Scotchman, seeks to set aside an antenuptial contract executed by her on the day of her marriage.

A question has been raised whether the contract was not in fact executed after the celebration of the marriage; but, without minutely considering the evidence, I am satisfied with the conclusion of the Lord Ordinary, that the contract was executed before the marriage, a conclusion which, indeed, is but feebly contested on the other side.

A Scottish widow is entitled to her *jus relictæ* and to her terce, unless they have been discharged; and the appellant seeks to remove the bar to these rights by setting aside the contract in question which, if unimpeached, discharges these rights.

My Lords, I think there has been some slight confusion between the question what forum can decide the controversy between the parties and what law that forum should administer in deciding it. Now it is admitted that the appellant was a domiciled Irishwoman at the time she executed the instrument in question. It is admitted she was a minor; and apart altogether from the remedy peculiar to Scottish jurisprudence of setting aside a contract which operates to the enorm lesion of a minor, a question to be determined in a great measure by the position of the parties and the provisions of the contract itself, the first question arises here whether a domiciled Irishwoman could bind herself at all, while a minor, by a contract executed in Ireland.

There can be no doubt as to what would be the rule of English law in this respect. The line of cases which were brought to your Lordships' attention upon the subject of provisions whereby the common-law right of dower was extinguished seem to me beside any question in this case. The statute created the power of extinguishing the right to dower, and Courts of Equity have from time to time considered and

¹ Acc. *U. S. v. Garlinghouse*, 4 Ben. 194 (*semble*); Appeal of Huey, 1 Grant Cas. 51. See *Thompson v. Ketcham*, 8 Johns. 190; where it was assumed that the law of the place of contracting governed, but in the absence of evidence that defendant was by that law incapable the plaintiff recovered. — ED.

² Parts of the opinions only are given. — ED.

acted upon their view how far the provision for the wife has complied with the conditions of the statute; but such cases have no relation to the question of a minor's capacity by his or her act to part with rights with which the law would otherwise invest them. None of these cases relate to the question of incapacity to contract by reason of minority, and the capacity to contract is regulated by the law of domicil. Story has with his usual precision laid down the rule (*Conflict of Laws*, § 64) that if a person is under an incapacity to do any act by the law of his domicil, the act when done there will be governed by the same law wherever its validity may come into contestation with any other country: quando lex in personam dirigitur respiciendum est ad leges illius civitatis quæ personam habet subjectam.

There is an unusual concurrence in this view amongst the writers on international law: qua ætate minor contrahere possit et ejusmodi respicere oportet ad legem, cujusque domicilii: Burgundus, Tract 2, n. 6. C'est ainsi que la majorité et la minorité du domicile ont lieu partout même pour les biens situés ailleurs: 1 Boullenois, Princip. Gen. 6. Quotiescunque de habilitate aut de inhabilitate personarum quæretur, toties domicilii leges et statuta spectanda: D'Argentré. So also J. Voet: Quoties in quæstione, an quis minor vel majorennis sit, obtinuit, id dijudicandum esse ex lege domicilii; sit ut in loco domicilii minorennis, ubique terrarum pro tali habendus sit, et contra.

It is said that the familiar exception of the place where the contract is to be performed prevents the application of the general rule, and that as both parties contemplated a Scottish married life, and as a consequence a Scottish domicil, the principle I have spoken of does not regulate the contract relations of these two persons. I think two answers may be given to this contention. In the first place, I think it is a misapplication of the principle upon which the exception is founded. Here there is no contractual obligation to make Scotland the domicil, nor is there any part of the contract which could not and ought not to receive complete fulfilment even if (contrary to what I admit was the contemplation of both the parties) the place of married life should remain in Ireland as if they had emigrated altogether and gone to some other country.

But another and a more overwhelming answer is to be found in this, that the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails. . . .

LORD WATSON. . . . Whether the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicil, or by the *lex loci contractus*, has been a fertile subject of controversy. In the present case it is unnecessary to decide the point, because Ireland was the country of the appellant's domicil, and also the place where the contract was made. It was argued, however, for the respondents, that the appellant's objection to the contract, although it rests upon her alleged incapacity to give consent, must be decided by the law of Scotland, as the *lex loci solutionis*. I am by no means

satisfied that Scotland was, in the proper sense of the phrase, the place of performance of the contract. The spouses no doubt intended to reside in Scotland, but they must also have intended that the contract should remain in force and be performed in any other country where they might, from choice or necessity, take up their abode. Apart from that consideration, and assuming Scotland to have been, in the strictest sense of the term, the *locus solutionis*, I think the argument of the respondents is untenable. The principle of international private law, which makes, in certain cases, the law of the place where it is to be performed the legal test of the validity of a contract, rests, in the first place, upon the assumption that the parties were, at the time when they contracted, both capable of giving an effectual consent; and, in the second place, upon an inference derived from the terms of the document, or from the circumstances of the case, that they mutually agreed to be bound by the *lex loci solutionis* in all questions touching its validity. That principle can, in my opinion, have no application to a case in which, at the time when they professed to contract, one of the parties was, according to the law of that party's domicile and also of the place of contracting, incapable of giving consent. . . .

LORD MACNAGHTEN. . . . It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favor of the law of the domicile. It may be that all cases are not to be governed by one and the same rule. But when the contract is made in the place where the person whose capacity is in question is domiciled there can be no room for dispute. It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile. . . .

*Appeal allowed.*¹

MILLIKEN v. PRATT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[Reported 125 Massachusetts, 374.]

CONTRACT to recover \$500 and interest from January 6, 1872. Writ dated June 30, 1875. The case was submitted to the Superior Court on agreed facts, in substance as follows:

The plaintiffs are partners doing business in Portland, Maine, under

¹ See *In re Cooke's Trusts*, 56 L. J. Ch. 637. — Ed.

the firm name of Deering, Milliken & Co. The defendant is, and has been since 1850, the wife of Daniel Pratt, and both have always resided in Massachusetts. In 1870, Daniel, who was then doing business in Massachusetts, applied to the plaintiffs at Portland for credit, and they required of him, as a condition of granting the same, a guaranty from the defendant to the amount of five hundred dollars, and accordingly he procured from his wife the following instrument:

"Portland, January 29, 1870. In consideration of one dollar paid by Deering, Milliken & Co, receipt of which is hereby acknowledged, I guarantee the payment to them by Daniel Pratt of the sum of five hundred dollars, from time to time as he may want — this to be a continuing guaranty. Sarah A. Pratt."

This instrument was executed by the defendant two or three days after its date, at her home in Massachusetts, and there delivered by her to her husband, who sent it by mail from Massachusetts to the plaintiffs in Portland; and the plaintiffs received it from the post-office in Portland early in February, 1870.

The plaintiffs subsequently sold and delivered goods to Daniel from time to time until October 7, 1871, and charged the same to him, and, if competent, it may be taken to be true, that in so doing they relied upon the guaranty. Between February, 1870, and September 1, 1871, they sold and delivered goods to him on credit to an amount largely exceeding \$500, which were fully settled and paid for by him. This action is brought for goods sold from September 1, 1871, to October 7, 1871, inclusive, amounting to \$860.12, upon which he paid \$300, leaving a balance due of \$560.12. The one dollar mentioned in the guaranty was not paid, and the only consideration moving to the defendant therefor was the giving of credit by the plaintiffs to her husband. Some of the goods were selected personally by Daniel at the plaintiffs' store in Portland, others were ordered by letters mailed by Daniel from Massachusetts to the plaintiffs at Portland, and all were sent by the plaintiffs by express from Portland to Daniel in Massachusetts, who paid all express charges. The parties were cognizant of the facts.

By a statute of Maine, duly enacted and approved in 1866, it is enacted that "the contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole." The statutes and the decisions of the court of Maine may be referred to.

Payment was duly demanded of the defendant before the date of the writ, and was refused by her.

The Superior Court ordered judgment for the defendant; and the plaintiffs appealed to this court.

GRAY, C. J. The general rule is that the validity of a contract is to be determined by the law of the State in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a State whose laws do not permit such a contract. *Scudder v. Union National Bank*, 91 U. S. 406. Even a contract expressly

prohibited by the statutes of the State in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the State, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own citizens abroad in a State the laws of which permit it. *Greenwood v. Curtis*, 6 Mass. 358; *M'Intyre v. Parks*, 3 Met. 207.

If the contract is completed in another State, it makes no difference in principle whether the citizen of this State goes in person, or sends an agent, or writes a letter, across the boundary line between the two States. As was said by Lord Lyndhurst, "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison v. Mills*, 1 Dow & Cl. 342, 363. So if a person residing in this State signs and transmits, either by a messenger or through the post-office, to a person in another State, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other State, or wrote and signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this Commonwealth. *M'Intyre v. Parks*, above cited.

The guaranty, bearing date of Portland, in the State of Maine, was executed by the defendant, a married woman, having her home in this Commonwealth, as collateral security for the liability of her husband for goods sold by the plaintiffs to him, and was sent by her through him by mail to the plaintiffs at Portland. The sales of the goods ordered by him from the plaintiffs at Portland, and there delivered by them to him in person, or to a carrier for him, were made in the State of Maine. *Orcutt v. Nelson*, 1 Gray, 536; *Kline v. Baker*, 99 Mass. 253. The contract between the defendant and the plaintiffs was complete when the guaranty had been received and acted on by them at Portland, and not before. *Jordan v. Dobbins*, 122 Mass. 168. It must therefore be treated as made and to be performed in the State of Maine.

The law of Maine authorized a married woman to bind herself by any contract as if she were unmarried. St. of Maine of 1866, c. 52; *Mayo v. Hutchinson*, 57 Maine, 546. The law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of any third person. Gen. Sts. c. 108, § 3; *Nourse v. Henshaw*, 123 Mass. 96. Since the making of the contract sued on, and before the bringing of this action, the law of this Commonwealth has been changed, so as to enable married women to make such contracts. St. 1874, c. 184; *Major v. Holmes*, 124 Mass. 108; *Kenworthy v. Sawyer*, 125 Mass. 28.

The question therefore is, whether a contract made in another State by a married woman domiciled here, which a married woman was not

at the time capable of making under the law of this Commonwealth, but was then allowed by the law of that State to make, and which she could now lawfully make in this Commonwealth, will sustain an action against her in our courts.

It has been often stated by commentators that the law of the domicile, regulating the capacity of a person, accompanies and governs the person everywhere. But this statement, in modern times at least, is subject to many qualifications; and the opinions of foreign jurists upon the subject, the principal of which are collected in the treatises of Mr. Justice Story and of Dr. Francis Wharton on the Conflict of Laws, are too varying and contradictory to control the general current of the English and American authorities in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicile, be deemed capable of making it.¹

Mr. Westlake, who wrote in 1858, after citing the decision of Lord Eldon,² well observed, "That there is not more authority on the subject may be referred to its not having been questioned;" and summed up the law of England thus: "While the English law remains as it is, it must, on principle, be taken as exceeding, in the case of transactions having their seat here, not only a foreign age of majority, but also all foreign determination of status or capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the continent." "The validity of a contract made out of England, with regard to the personal capacity of the contractor, will be referred in our courts to the *lex loci contractus*; that is, not to its particular provisions on the capacity of its domiciled subjects, but in this sense, that, if good where made, the contract will be held good here, and conversely." Westlake's Private International Law, §§ 401, 402, 404.*

In *Greenwood v. Curtis*, Chief Justice Parsons said, "By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this State; although such contract may not be valid by our laws, or even may be

¹ The learned Chief Justice here examined the following cases: *Ex parte Lewis*, 1 Ves. Sen. 298; *Morrison's Case*, Mor. Dict. Dec. 4595; *Ex parte Watkins*, 2 Ves. Sen. 470; *In re Houston*, 1 Russ. 312; *Johnstone v. Beattie*, 10 Cl. and F. 42; *Stuart v. Bute*, 9 H. L. C. 440; *Nugent v. Vetzera*, L. R. 2 Eq. 704; *Woodworth v. Spring*, 4 All. 321; *Male v. Roberts*, 3 Esp. 163; *Thompson v. Ketcham*, 8 Johns. 189. — Ed.

² *Male v. Roberts*, *supra*. — Ed.

³ The learned Chief Justice here stated *In re Hellmann's Will*, L. R. 2 Eq. 363; and criticised the following Louisiana cases: *Baldwin v. Gray*, 16 Mart. 192; *Saul v. His Creditors*, 17 Mart. 569; *Andrews v. His Creditors*, 11 La. 464; *Le Breton v. Nouchet*, 3 Mart. 60; *Barrera v. Alpente*, 18 Mart. 69; *Garnier v. Poydras*, 13 La. 177; *Gale v. Davis*, 4 Mart. 645. — Ed.

prohibited to our citizens;" and that the Chief Justice considered this rule as extending to questions of capacity is evident from his subsequent illustration of a marriage contracted abroad between persons prohibited to intermarry by the law of their domicil. 6 Mass. 377-379. The validity of such marriages (except in case of polygamy, or of marriages incestuous according to the general opinion of Christendom) has been repeatedly affirmed in this Commonwealth. *Medway v. Needham*, 16 Mass. 157; *Sutton v. Warren*, 10 Met. 451; *Commonwealth v. Lane*, 113 Mass. 458.

The recent decision in *Sottomayor v. De Barros*, 3 P. D. 1, by which Lords Justices James, Baggallay, and Cotton, without referring to any of the cases that we have cited, and reversing the judgment of Sir Robert Phillimore in 2 P. D. 81, held that a marriage in England between first cousins, Portuguese subjects, resident in England, who by the law of Portugal were incapable of intermarrying except by a Papal dispensation, was therefore null and void in England, is utterly opposed to our law; and consequently the dictum of Lord Justice Cotton, "It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil," is entitled to little weight here.

It is true that there are reasons of public policy for upholding the validity of marriages, that are not applicable to ordinary contracts; but a greater disregard of the *lex domicilii* can hardly be suggested, than in the recognition of the validity of a marriage contracted in another State, which is not authorized by the law of the domicil, and which permanently affects the relations and the rights of two citizens and of others to be born.

Mr. Justice Story, in his *Commentaries on the Conflict of Laws*, after elaborate consideration of the authorities, arrives at the conclusion that "in regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicil of birth, or the law of any other acquired and fixed domicil, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made, or the act done;" or as he elsewhere sums it up, "although foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract; yet the common law holds a different doctrine, namely, that the *lex loci contractus* is to govern." *Story Conf. §§ 103, 241*. So Chancellor Kent, although in some passages of the text of his *Commentaries* he seems to incline to the doctrine of the civilians, yet in the notes afterwards added unequivocally concurs in the conclusion of Mr. Justice Story. 2 Kent Com. 233 note, 458, 459 & note.

In *Pearl v. Hansborough*, 9 Humph. 426, the rule was carried so far as to hold that where a married woman domiciled with her husband in the State of Mississippi, by the law of which a purchase by a married woman was valid and the property purchased went to her separate

use, bought personal property in Tennessee, by the law of which married women were incapable of contracting, the contract of purchase was void and could not be enforced in Tennessee. Some authorities, on the other hand, would uphold a contract made by a party capable by the law of his domicile, though incapable by the law of the place of the contract. *In re Hellmann's Will*, and *Saul v. His Creditors*, above cited. But that alternative is not here presented. In *Hill v. Pine River Bank*, 45 N. H. 300, the contract was made in the State of the woman's domicile, so that the question before us did not arise and was not considered.

The principal reasons on which continental jurists have maintained that personal laws of the domicile, affecting the status and capacity of all inhabitants of a particular class, bind them wherever they may go, appear to have been that each State has the rightful power of regulating the status and condition of its subjects, and, being best acquainted with the circumstances of climate, race, character, manners, and customs, can best judge at what age young persons may begin to act for themselves, and whether and how far married women may act independently of their husbands; that laws limiting the capacity of infants or of married women are intended for their protection, and cannot therefore be dispensed with by their agreement; that all civilized States recognize the incapacity of infants and married women; and that a person, dealing with either, ordinarily has notice, by the apparent age or sex, that the person is likely to be of a class whom the laws protect, and is thus put upon inquiry how far, by the law of the domicile of the person, the protection extends.

On the other hand, it is only by the comity of other States that laws can operate beyond the limit of the State that makes them. In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one State to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all.

As the law of another State can neither operate nor be executed in this State by its own force, but only by the comity of this State, its operation and enforcement here may be restricted by positive prohibition of statute. A State may always by express enactment protect itself from being obliged to enforce in its courts contracts made abroad by its citizens, which are not authorized by its own laws. Under the French code, for instance, which enacts that the laws regulating the status and capacity of persons shall bind French subjects, even when

living in a foreign country, a French court cannot enforce a contract made by a Frenchman abroad, which he is incapable of making by the law of France. See Westlake, §§ 399, 400.

It is possible also that in a State where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the State, for the protection of its own citizens, that it could not be held by the courts of that State to yield to the law of another State in which she might undertake to contract.

But it is not true at the present day that all civilized States recognize the absolute incapacity of married women to make contracts. The tendency of modern legislation is to enlarge their capacity in this respect, and in many States they have nearly or quite the same powers as if unmarried. In Massachusetts, even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business, and earnings; and, before the bringing of the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action.

Judgment for the plaintiffs.

SWANK v. HUFNAGLE.

SUPREME COURT OF INDIANA. 1887.

[Reported 111 Indiana, 583.]

ELLIOTT, J. The appellant sued the appellee, Melissa Hufnagle, and her husband, upon a note and mortgage executed in Darke County, Ohio, on land situate in this State. The appellee, Melissa Hufnagle, answered that she was a married woman, and that the mortgage was executed by her as the surety of her husband, and assumed to convey land in this State owned by her. The appellant replied that the con-

tract was made in Ohio, and that by a statute of that State a married woman had power to execute such a mortgage, but the statute of Ohio is not set forth.

The trial court did right in adjudging the reply bad. The validity of the mortgage of real property is to be determined by the law of the place where the property is situated. Mr. Jones says: "A mortgage of course takes effect by virtue of the law of the place where the land is situated." 1 Jones, Mortg. § 823. This is well settled law. Story, Conflict of Laws (8th ed.), 609 auth. n.; Bethell v. Bethell, 92 Ind. 318.

Judge Story, in sections 66 and 102 of his work on the Conflict of Laws, does not treat of conveyances or mortgages of land, but of contracts of an entirely different class, so that the appellant gets no support from what is there laid down as the law.

Under the act of 1881 a mortgage executed by a married woman as surety on land owned by her in this State is void.

There is another reason for adjudging the reply bad, and that is this, it does not set out the foreign statute on which it professes to be based. It is well settled that where a pleading is founded on a foreign statute the statute must be set forth. Wilson v. Clark, 11 Ind. 385; Mendenhall v. Gately, 18 Ind. 149; Kenyon v. Smith, 24 Ind. 11; Tyler v. Kent, 52 Ind. 583; Milligan v. State, *ex rel.*, 86 Ind. 553.

We cannot disturb the finding on the evidence.

Judgment affirmed.

ON PETITION FOR A REHEARING.

ELLIOTT, J. In the argument on the petition for a rehearing, counsel contend that we were in error in holding that a mortgage executed by a married woman in Ohio as surety for her husband cannot be enforced in this State, and they refer us to cases holding that the construction of a contract is governed by the law of the place where it was made. But the argument is unavailing, for counsel mistake the point in dispute. The question is not how the contract shall be construed, but had the married woman capacity to execute it? The question is one of capacity, not of construction. The trial court was not asked to construe a mortgage, but to enforce one which our statute declares shall not be enforceable. The purpose of the suit is not to obtain a judicial interpretation of a contract, but to foreclose a mortgage which our law declares a married woman has no capacity to execute.

We suppose it quite clear that if the mortgagor has no capacity to execute a deed or mortgage, the instrument cannot be enforced, although the incapacity is established by the law of the place where the land is situated. If, for instance, a married woman should execute a deed or mortgage without her husband joining with her, it could not be enforced in a State where the law required her husband to join. This is so because the question is one of power, and power

is created or withheld by the law of the place where the land lies. It is hardly necessary to cite authorities upon this elementary proposition, but there is so conveniently at hand a decision of the Supreme Court of Ohio, where the rule is affirmed, that we cite it. *Brown v. National Bank*, 44 Ohio St. 269. In that case it was said: "We are not unmindful of the principle that deeds intended to convey or encumber an interest in land situated in one State, executed in another, must derive their vitality from the laws of the former."

Our statute provides that the deeds of persons under twenty-one years of age shall be voidable, and this law would undoubtedly entitle an infant under that age to avoid a deed to land in this State executed in Ohio, and the principle in such a case is the same as that which rules here, for, in both cases, the question is one of capacity. In discussing this question an American author says: "But in reference to contracts about the sale and conveyance of land such capacity depends upon the laws of the State wherein the land is situated. This is the general ruling in America as to the law upon these subjects, in whatsoever court the question may arise, domestic or foreign. This rule applies to questions of infancy, coverture, majority, and of legal capacity generally." *Rorer, Inter-State Law*, 190; 1 *Jones, Mortg.*, § 662; 4 *Kent Com.*, star p. 441.

*Petition overruled.*¹

SELL v. MILLER.

SUPREME COURT OF OHIO. 1860.

[*Reported 11 Ohio State, 331.*]

By THE COURT. Where a married woman over eighteen, but under twenty-one years of age, has her domicil, and joins with her husband in the execution of a mortgage, within a foreign jurisdiction, where the age of majority is fixed at twenty-one years, upon real estate situate in Ohio, held: That such mortgage is not invalid for want of capacity on her part to contract; the capacity to contract, in respect to immovables, being governed by the law of the situs, and not by the law of the domicil.

Motion overruled.

¹ *Acc. Post v. First Nat. Bank*, 138 Ill. 559, 28 N. E. 978; *Cochran v. Benton*, 126 Ind. 58; *Frierson v. Williams*, 57 Miss. 451; *Johnson v. Gawtry*, 1 Mo. App. 322; *Wood v. Wheeler*, 111 N. C. 231; *Baum v. Birchall*, 150 Pa. 164, 24 Atl. 620. *Contra*, *Kelly v. Davis*, 28 La. Ann. 773. — Ed.

SECTION II.

MARRIAGE.

DALRYMPLE v. DALRYMPLE.

CONSISTORY COURT OF LONDON. 1811.

[Reported 2 Haggard Consistory, 54.]

THIS was a case of restitution of conjugal rights, brought by the wife against the husband, in which the chief point in discussion was, the validity of a Scotch marriage, *per verba de præsenti*, and without religious celebration: one of the parties being an English gentleman, not otherwise resident in Scotland than as quartered with his regiment in that country.

SIR WILLIAM SCOTT.¹ The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition, for which the court has to acknowledge great obligations to the gentlemen, who have been examined in Scotland. It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland. . . .

The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of Scotland, arising from a foreign birth and education, are common to both, and I might say, to all systems of law. They are circumstances, which are not to be left entirely out of the consideration of the court, in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law, which, in both countries, allows the minor to marry, attributes to him, in a way which cannot be legally averred against, upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion, *quoad hoc*, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession exonerate a man from the

¹ Part of the opinion is omitted. — Ed.

general obligations of law. And with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge, and sense of the obligation, which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr. Dalrymple, though a minor, a soldier, and a foreigner, as effectively as it would do if he had been an adult, living in a civil capacity, and with an established domicile in that country.

The marriage, which is pleaded to be constituted, by virtue of some or all of the facts, of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a clandestine and irregular marriage. It is certainly a private transaction between the individuals, but it does not of course follow that it is to be considered as a clandestine transaction, in any ignominious meaning of the word; for it may be that the law of the country in which the transaction took place may contemplate private marriages with as much countenance and favor as it does the most public. It depends likewise entirely upon the law of the country whether it is justly to be styled an irregular marriage. In some countries one only form of contracting marriage is acknowledged, as in our own, with the exception of particular indulgences to persons of certain religious persuasions; saving those exceptions, all marriages not celebrated according to the prescribed form are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries, all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries, a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law, on account of the non-conformity to the order that is established. What is the law of Scotland upon this point? . . .

I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de præsenti* does not require consummation in order to become "very matrimony;" that it does, *ipso facto et ipso jure*, constitute the relation of man and wife. . . . When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract.¹ . . .

¹ The court, upon examining the evidence, held that in this case a marriage had taken place according to the Scotch law. — Ed.

WARTER v. WARTER.

HIGH COURT OF JUSTICE, PROBATE DIVISION. 1890.

[Reported 15 Probate Division, 152.]

SIR JAMES HANNEN, PRESIDENT. The plaintiff claims probate of a will¹ dated February 6, 1880, made by her father, Henry De Grey Warter, who died on March 23, 1889. The defendant, the son of Henry De Grey Warter, alleges that the will, dated February 6, 1880, was revoked by the subsequent marriage of the testator with Annette Louisa Tayloe on April 2, 1881. The question in the cause is whether the marriage celebrated on April 2, 1881, was the marriage of the parties—that is, whether they had not concluded a valid marriage before the execution of the will—namely, on February 3, 1880. The material facts are as follows: The mother of the plaintiff and defendant was formerly the wife of John Edward Tayloe, and was resident with him in India. In 1879 Henry De Grey Warter, the deceased in this cause, was a major in the Royal Artillery, stationed in India. In 1879 John Edward Tayloe, being so resident, instituted proceedings in the High Court of Judicature at Fort William in Bengal for the dissolution of his marriage on the ground of his wife's adultery with Major De Grey Warter, and a decree nisi was pronounced on May 19, 1879. This decree was made absolute on November 27, 1879. By the Indian Divorce Act of 1869, jurisdiction is given to dissolve the marriage when the petitioner professes the Christian religion and resides in India at the time of presenting the petition—that is, though he or she may not be domiciled there. On the institution of the proceedings Mrs. Tayloe returned to England. Major De Grey Warter afterwards joined her in England, and went through a ceremony of marriage on February 3, 1880. At the time of the marriage Major De Grey Warter was domiciled in England. By the Indian Divorce Act—Act No. 4 of 1869—under which the proceedings were taken, it is enacted that “when six months after the date of any decree of the High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death.” The marriage in question in this case took place within three months of the decree. It was contended that as this marriage was celebrated in England the parties were freed from the restraint imposed by the Indian Divorce Act. I am of opinion that that is not the case. Mrs. Tayloe was subject to the Indian law of divorce, and she could only contract a valid second marriage by showing that the incapacity arising from her

¹ By the terms of his will Colonel Warter left all his property to his “reputed wife.”—ED.

previous marriage had been effectually removed by the proceedings taken under that law. This could not be done, as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage. The case of *Scott v. Attorney-General*, 11 P. D. 128, was relied on for the plaintiff. It there held that a colonial law prohibiting the marriage of the guilty party, so long as the other remained unmarried, did not operate as a bar to marriage where the guilty party had acquired a domicile in this country. The distinction between that case and the present is that there the incapacity to remarry imposed by the colonial law only attached to the guilty party. It was, therefore, penal in its character, and as such was inoperative out of the jurisdiction under which it was inflicted. A case to the same effect, and based on the same principle, was cited from an American report: *Ponsford v. Johnson*, 2 Blatchf. 51. For these reasons I am of opinion that the marriage of February 3, 1880, was invalid, and consequently that the will of February 6, 1880, was revoked by the valid marriage celebrated on April 2, 1881.

SOTTOMAYOR v. DE BARROS.

COURT OF APPEAL. 1877.

[*Reported 3 Probate Division, 1.*]

COTTON, L. J. This is an appeal from an order of the Court of Divorce, dated the 17th of March, 1877, dismissing a petition presented by Ignacia Sottomayor, praying the court to declare her marriage with the respondent Gonzalo de Barros to be null and void. The respondent appeared to the petition, but did not file an answer or appear at the hearing; and by direction of the judge, the Queen's proctor was served with the petition, and appeared by counsel to argue the case against the petition.

There were several grounds on which the petitioner originally claimed relief, but the only ground now to be considered is that she and the respondent were under a personal incapacity to contract marriage. The facts are these: The petitioner and respondent are Portuguese subjects, and are and have always been domiciled in that country, where they both now reside. They are first cousins, and it was proved that by the law of Portugal first cousins are incapable of contracting marriage by reason of consanguinity, and that any marriage between parties so related is by the law of Portugal held to be incestuous and therefore null and void; but though not proved, it was

admitted before us that such a marriage would be valid if solemnized under the authority of a papal dispensation.

In the year 1858 the petitioner, her father and mother, and her uncle, De Barros, and his family, including the respondent, his eldest son, came to England, and the two families occupied a house jointly in Dorset Square, London. The petitioner's father came to this country for the benefit of his health, and De Barros for the education of his children and to superintend the sale of wine. De Barros subsequently, in 1861, became manager to a firm of wine merchants in London, carrying on business under the style of Caldos Brothers & Co., of which the petitioner's father was made a partner, and which stopped payment in 1865. On the 21st of June, 1866, the petitioner, at that time of the age of fourteen years and a half, and the respondent, of the age of sixteen years, were married at a registrar's office in London. No religious ceremony accompanied or followed the marriage, and although the parties lived together in the same house until the year 1872, they never slept together, and the marriage was never consummated. The petitioner stated that she went through the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese property from the consequences of the bankruptcy of the wine business.

Under these circumstances the petitioner, in November, 1874, presented her petition for the object above mentioned, and Sir R. Phillimore, before whom the case was heard, declined to declare the marriage invalid and dismissed the petition, but did so, as we understand, rather because he felt himself bound by the decision in the case of *Simonin v. Mallac*, 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97, than because he considered that on principle the marriage ought to be held good. If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid. But it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between

persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized. In argument several passages in Story's Conflict of Laws were referred to, in support of the contention that in an English court a marriage between persons who by our law may lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicile, unless the marriage is one which the general consent of Christendom stamps as incestuous. It is hardly possible to suppose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous. Probably the true explanation of the passages in Story is given in *Brook v. Brook*, 9 H. L. C. 193, at pp. 227, 241, by Lord Cranworth and by Lord Wensleydale, who express their opinions that he is referring to marriages not prohibited or declared to be incestuous by the municipal law of the country of domicile.

But it is said that the impediment imposed by the law of Portugal can be removed by a Papal dispensation, and, therefore, that it cannot be said there is a personal incapacity of the petitioner and respondent to contract marriage. The evidence is clear that by the law of Portugal the impediment to the marriage between the parties is such that, in the absence of Papal dispensation, the marriage would be by the law of that country void as incestuous. The statutes of the English Parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous; but the law of Portugal does recognize the validity of such a dispensation, and it cannot in our opinion be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected, or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage. It is proved that the courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void, as solemnized between parties incapable of marrying, and incestuous. How can the courts of this country hold the contrary, and, if appealed to, say the marriage is valid? It was pressed upon us in argument that a decision in favor of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicile of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognize the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being

relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognized by the law of this country.

The counsel for the petitioner relied on the case of *Brook v. Brook*, as a decision in his favor. If, in our opinion, that case had been a decision on the question arising on this petition, we should have thought it sufficient without more to refer to that case as decisive. The judgment in that case, however, only decided that the English courts must hold invalid a marriage between two English subjects domiciled in this country, who were prohibited from intermarrying by an English statute, even though the marriage was solemnized during a temporary sojourn in a foreign country. It is, therefore, not decisive of the present case; but the reasons given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based.

It only remains to consider the case of *Simonin v. Mallac*. The objection to the validity of the marriage in that case, which was solemnized in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin v. Mallac* does not, we think, govern the present case. We are of opinion that the judgment appealed from must be reversed, and a decree made declaring the marriage null and void.

*Judgment reversed.*¹

¹ The case having been sent down to the Probate Division of the High Court, Sir JAMES HENNELLY, President, found that though the petitioner was domiciled in Portugal at the time of the marriage, the respondent was domiciled in England at that time; and he held the marriage valid. In the course of his opinion he said: "The Lord Justices appear to have laid down as a principle of law a proposition which was much wider in its terms than was necessary for the determination of the case before them. It is thus expressed: 'It is a well recognized principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicile;' and again, 'As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile.' It is of course competent for the Court of Appeal to lay down a principle which, if it formed the basis of a judgment of that court, must, unless it should be disclaimed by the House of Lords, be binding in all future cases. But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been 'well recognized.' On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the other way." — ED.

COMMONWEALTH v. LANE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[Reported 113 *Massachusetts*, 458.]INDICTMENT on the Gen. Sts. c. 165, § 4, for polygamy.¹

GRAY, C. J. The report finds that the defendant was lawfully married to his first wife in this Commonwealth; that she obtained a divorce here from the bond of matrimony, for his adultery; that he was afterwards, while still a resident of this Commonwealth, married to a second wife in the State of New Hampshire, and cohabited with her in this Commonwealth, the first wife being still alive; and the question is whether he is indictable for polygamy, under the Gen. Sts. c. 165, § 4.

It is provided by our statutes of divorce that, in cases of divorce from the bond of matrimony, the innocent party may marry again as if the other party were dead; but that any marriage contracted by the guilty party during the life of the other, without having obtained leave from this court to marry again, shall be void, and such party shall be adjudged guilty of polygamy. Gen. Sts. c. 107, §§ 25, 26; St. 1864, c. 216.

The marriage act, Gen. Sts. c. 106, specifies, in §§ 1-3, what marriages shall be void by reason of consanguinity or affinity; in § 4, that all marriages contracted while either of the parties has a former wife or husband living, except as provided in c. 107, shall be void; in § 5, that no insane person or idiot shall be capable of contracting marriage; and in § 6 as follows: "When persons resident in this State, in order to evade the preceding provisions, and with an intention of returning to reside in this State, go into another State or country, and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this State."

All these sections, except the last, are manifestly directed and limited to marriages within the jurisdiction of this Commonwealth; and the last has no application to this case, because it does not appear to have been proved or suggested at the trial that the parties to the second marriage went out of this State to evade our laws, or even that the second wife had resided in this State or knew of the previous marriage and divorce.

By the Gen. Sts. c. 165, § 4, "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this State," shall (except when the first husband or wife has for seven years been absent and not known to the other party to be living, or in case of a person legally divorced from the bonds of matrimony and not the guilty cause of such divorce) be deemed guilty of polygamy and punished accordingly.

This statute is not intended to make any marriages unlawful which

¹ Statement of facts and arguments of counsel are omitted.—ED.

are not declared to be unlawful by other statutes, nor to punish cohabitation under a lawful marriage. Its object is to prohibit unlawful second marriages, whether the parties are actually married in this Commonwealth, or continue after being married elsewhere to cohabit here. But in either alternative, in order to sustain the indictment, the second marriage must be unlawful. It is not enough that the marriage is such as would be unlawful if contracted in this Commonwealth; it must be a marriage which, being contracted where it was, is unlawful here.

The marriage in New Hampshire is stated in the report to have been "according to the forms of law;" and it appears by the statutes of New Hampshire, therein referred to, that the only provision relating to the invalidity of marriages on account of the incompetency of parties to contract them is as follows: "All marriages prohibited by law, on account of the consanguinity or affinity of the parties, or where either has a former wife or husband living, knowing such wife or husband to be alive, if solemnized in this State, shall be absolutely void without any decree of divorce or other legal process." Gen. Sts. of N. H. (1867), c. 163, § 1. That provision clearly does not extend to a case in which the former wife, having obtained a divorce from the bond of matrimony, was absolutely freed from all obligation to the husband, and in which, as observed by Mr. Justice Wilde, in a like case, "notwithstanding the restraints imposed on the husband, he being the guilty cause of the divorce, the dissolution of the marriage contract was total, and not partial." *Commonwealth v. Putnam*, 1 Pick. 136, 139. The marriage in New Hampshire must therefore be taken to have been valid by the law of that State.

The question presented by the report is therefore reduced to this: If a man who has been lawfully married in this Commonwealth, and whose wife has obtained a divorce *a vinculo* here because of his adultery, so that he is prohibited by our statutes from marrying again without leave of this court, is married, without having obtained leave of the court, and being still a resident of this Commonwealth, to another woman in another State, according to its laws, and afterwards cohabits with her in this Commonwealth, is his second marriage valid here?

The determination of this question depends primarily upon the construction of our statutes, but ultimately upon fundamental principles of jurisprudence, which have been clearly declared by the judgments of our predecessors in this court, and in the light of which those statutes must be read in order to ascertain their just extent and effect.

What marriages between our own citizens shall be recognized as valid in this Commonwealth is a subject within the power of the legislature to regulate. But when the statutes are silent, questions of the validity of marriages are to be determined by the *jus gentium*, the common law of nations, the law of nature as generally recognized by all civilized peoples.

By that law, the validity of a marriage depends upon the question

whether it was valid where it was contracted ; if valid there, it is valid everywhere.

The only exceptions admitted by our law to that general rule are of two classes : 1st. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries ; 2d. Marriages which the legislature of the Commonwealth has declared shall not be allowed any validity, because contrary to the policy of our own laws.

The first class includes only those void for polygamy or for incest. To bring it within the exception on account of polygamy, one of the parties must have another husband or wife living. To bring it within the exception on the ground of incest, there must be such a relation between the parties contracting as to make the marriage incestuous according to the general opinion of Christendom ; and, by that test, the prohibited degrees include, beside persons in the direct line of consanguinity, brothers and sisters only, and no other collateral kindred. *Wightman v. Wightman*, 4 Johns. Ch. 343, 349-351 ; 2 Kent Com. 83 ; Story, Conf. § 114 ; *Sutton v. Warren*, 10 Met. 451 ; *Stevenson v. Gray*, 17 B. Mon. 193 ; *Bowers v. Bowers*, 10 Rich. Eq. 551.

A marriage abroad between persons more remotely related, not absolutely void by the law of the country where it was celebrated, is valid here, at least until avoided by a suit instituted for the purpose, even if it might have been so avoided in that country ; and this is so whether the relationship between the parties is one which would not make the marriage void if contracted in this Commonwealth, as in the case of a marriage between a widower and his deceased wife's sister, or one which would invalidate a marriage contracted here, as in the case of a marriage between aunt and nephew.

In *Greenwood v. Curtis*, 6 Mass. 358, 378, 379, Chief Justice Parsons said : " If a foreign State allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one State, and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States ; such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract." This distinction was approved by Chancellor Kent and by Judge Story. 2 Kent Com. 85, note a ; Story, Conf. § 116.

In *The Queen v. Wye*, 7 A. & E. 761, 771 ; s. c. 3 N. & P. 6, 13, 14 ; it was decided that the marriage of a man with his mother's sister in England before the St. of 5 & 6 Will. IV. c. 54, though voidable by process in the ecclesiastical courts, was, until so avoided, valid for all civil purposes, including legitimacy and settlement. In accordance with that decision, it was held in *Sutton v. Warren*, 10 Met. 451, that such a marriage contracted in England, and never avoided there, must, upon the subsequent removal of the parties to Massachusetts, and the

question arising collaterally in an action at common law, be deemed valid here, although, if contracted in this Commonwealth, it would have been absolutely void.

A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the State shall have no validity here. This has been repeatedly affirmed by well-considered decisions.

For example, while the statutes of Massachusetts prohibited marriages between white persons and negroes or mulattoes, a mulatto and a white woman, inhabitants of Massachusetts, went into Rhode Island, and were there married according to its laws, and immediately returned into Massachusetts; and it was ruled by Mr. Justice Wilde at the trial, and affirmed by the whole court, that the marriage, even if the parties went into Rhode Island to evade our laws, yet, being good and valid there, must upon general principles be so considered here, and that the wife therefore took the settlement of her husband in this Commonwealth. *Medway v. Needham*, 16 Mass. 157.

So it has been held that a man, from whom his wife had obtained in this State a divorce *a vinculo* for his adultery, which by our statutes disabled him from contracting another marriage, might lawfully marry again in another State according to its laws; that the children of such marriage took the settlement of their father in this Commonwealth; and that the new wife was entitled to dower in his lands here, even if the wife as well as the husband was domiciled here, and knew of the previous divorce and its cause, and went into the other State to evade our laws—so long as our statutes did not declare a marriage contracted there with such intent to be void here. *West Cambridge v. Lexington*, 1 Pick. 506; *Putnam v. Putnam*, 8 Pick. 433. See also *Dickson v. Dickson*, 1 Yerger, 110; *Ponsford v. Johnson*, 2 Blatchf. C. C. 51; 2 Kent Com. 91-93.

The principles upon which these decisions proceeded were recognized in all the English cases decided before the American Revolution, although it is true, as has since been pointed out, that the particular question in each of them related rather to the forms required than to the capacity of the parties.

Lord Hardwicke's Marriage Act in 1752 provided that all marriages of minors, solemnized by license without the consent of parents or guardians, should be void. St. 26 Geo. II. c. 33, § 11. Yet in the first case which arose under that act, in which an English boy of eighteen years old went abroad with an English woman, and was there married to her without such consent, Lord Hardwicke, sitting as chancellor, assumed that if the marriage had been valid by the law of the country in which it was celebrated, it would have been valid in England, saying: "It will not be valid here unless it is so by the laws of

the country where it was had ; and so it was said by Murray, attorney-general, to have been determined lately at the Delegates." And it would seem by the report that the woman defeated an application to the Ecclesiastical Court to annul the marriage, by refusing to appear there. *Butler v. Freeman*, Ambl. 301.

The case, thus referred to as determined at the Delegates, was evidently *Scrimshire v. Scrimshire*, decided by Sir Edward Simpson in the Consistory Court in 1752. Of that opinion, Sir George Hay, in *Harford v. Morris*, 2 Hagg. Con. 423, 431, said, " Every man has allowed the great and extensive knowledge of the judge ;" and Sir William Wynne, in *Middleton v. Janverin*, 2 Hagg. Con. 437, 446, remarked that he remembered to have heard that the judgment was founded on great deliberation, and that Lord Hardwicke was consulted on it.

In *Scrimshire v. Scrimshire*, Sir Edward Simpson, in delivering judgment, said : " The question being in substance this, Whether, by the law of this country, marriage contracts are not to be deemed good or bad according to the law of the country in which they are formed ; and whether they are not to be construed by that law ? If such be the law of this country, the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country, which sanction and adopt this rule of decision." " All nations allow marriage contracts ; they are *juris gentium*, and the subjects of all nations are equally concerned in them ; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries, — that is, the law where the contract is made." And he declared the marriage in that case to be invalid, only because it appeared to be wholly null and void by the laws of France, where it was celebrated. 2 Hagg. Con. 395, 407, 408, 417, 421.

In *Compton v. Bearcroft* (1767–69), where the parties, both being English subjects and the libellant a minor, ran away and were married in Scotland, a libel for the nullity of the marriage was dismissed by Sir George Hay in the Court of Arches, upon the ground that Lord Hardwicke's Act did not extend to Scotland ; but by the Court of Delegates on appeal, consisting of Justices Gould and Aston, Baron Perrott, and two doctors of civil law, upon the broader ground that the marriage was good by the *lex loci*. 2 Hagg. Con. 430, 443, 444, and note ; s. c. Bul. N. P. 113, 114. See also *Ilderton v. Ilderton*, 2 H. Bl. 145 ; *Dalrymple v. Dalrymple*, 2 Hagg. Con. 54, 59 ; *Ruding v. Smith*, ib. 371, 390, 391 ; *Steele v. Braddell*, Milward, 1, 21.

In a recent case in the House of Lords, the cases of *Medway v.*

Needham, 16 Mass. 157, and *Sutton v. Warren*, 10 Met. 451, above cited, have been severely criticised, and pointedly denied to be law. *Brook v. Brook*, 9 H. L. Cas. 193; s. c. 8 Sm. & Giff. 481. As that court is the one of all foreign tribunals, the opinions of which, owing to the learning, experience, and ability of the judges, we are accustomed to regard with the most respect, it becomes necessary to examine with care the scope of that decision, and the soundness of the reasons assigned for it; and in order to make this examination intelligible, it will be convenient first to refer to the English statutes and to some earlier decisions.

Several statutes of Henry VIII., which it is necessary to state in detail, declared marriages within certain degrees of consanguinity and affinity, and among others the marriage of a widower with his deceased wife's sister, to be "contrary to God's law as limited and declared by act of Parliament." Sts. 25 Hen. VIII. c. 22; 28 Hen. VIII. cc. 7, 16; 32 Hen. VIII. c. 38. While those statutes remained unaltered, a period of nearly three hundred years, such marriages were held by the judges not to be absolutely void, but voidable only by suit in the ecclesiastical courts during the lifetime of both parties, and, if not so avoided, were treated as valid, the wife entitled to dower, and the children of the marriage legitimate. Co. Lit. 33; *Hinks v. Harris*, 4 Mod. 182; s. c. 12 Mod. 35; Carth. 271; 2 Salk. 548. Lord Hardwicke, in *Brownsword v. Edwards*, 2 Ves. Sen. 243, 245; 1 Bl. Com. 434, 435; *Elliott v. Gurr*, 2 Phillim. 16; *The Queen v. Wye*, 7 A. & E. 761, 771; s. c. 3 N. & P. 6, 13, 14; *Westby v. Westby*, 2 Dru. & War. 502, 515, 516; s. c. 1 Con. & Laws. 537, 544, 545; 4 Irish Eq. 585, 593.

The St. of 5 & 6 Will. IV. c. 54, commonly known as Lord Lyndhurst's Act, provided, as to marriages between persons within the prohibited degrees of affinity, as follows: 1st, that such marriages, celebrated before the passage of the act, should not be annulled, except in a suit already pending in the ecclesiastical courts; 2d, that such marriages, thereafter celebrated, should be absolutely null and void to all intents and purposes whatever; 3d, that nothing in this act should be construed to extend to Scotland.

The marriage of a widower with the sister of his deceased wife, in England, after this statute, was held to be within the prohibited degrees and utterly void. *The Queen v. Chadwick*, 11 Q. B. 173, 234.

A case afterwards came before the Scotch courts, in which an English citizen married his deceased wife's sister in England; the validity of the marriage was not disputed during her life, and she died before the St. of Will. IV.; and the question was, whether the children of the marriage could inherit his lands in Scotland. The Scotch courts, in a series of very able opinions, held that they could, upon the ground that by the law of England, the marriage, not having been challenged in the lifetime of both parties, could not in any form be declared invalid in England, and the children were legitimate there, and must therefore

be deemed legitimate in Scotland. *Fenton v. Livingstone*, 16 Ct. of Sess. Cas. (2d Series) 104, and 18 ib. 865. The House of Lords, on appeal, reversed that decision, and held that, although the marriage had, by reason of the peculiar rules governing the English courts of temporal and ecclesiastical jurisdiction, become irrevocable there, yet it was always illegal; and that, those rules not being applicable in the Scotch courts, the legitimacy of the children in Scotland depended upon the question whether the marriage was illegal by the law of Scotland. s. c. 3 Macq. 497. The Scotch court thereupon decided that the marriage was illegal, and that the children were incapable of inheriting lands in Scotland. s. c. 23 Ct. of Sess. Cas. (2d Series) 366.

In *Brook v. Brook*, *ubi supra*, a widower and the sister of his deceased wife, being lawfully domiciled in England, while on a temporary visit to Denmark, had a marriage solemnized between them, which was by the laws of Denmark lawful and valid to all intents and purposes whatsoever. In a suit in equity, brought after the death of both parties, to ascertain the rights of the children in their father's property, the House of Lords, in accordance with the opinions of Lords Campbell, Cranworth, St. Leonards, and Wensleydale, and affirming a decree rendered by Vice Chancellor Stuart, assisted by Mr. Justice Cresswell, held that the marriage in Denmark was wholly void by the St. of Will. IV., and that the children of that marriage were bastards.

The decision was put, by the learned judges who concurred in it, upon three different grounds.

The first ground was that the St. of Will. IV. disqualified English subjects everywhere from contracting such a marriage. This ground was taken in the court below, and by Lord St. Leonards in the House of Lords. 3 Sm. & Giff. 522, 525; 9 H. L. Cas. 234-238. But it was expressly disclaimed by Lord Campbell, Lord Cranworth, and Lord Wensleydale, the two former of whom expressed opinions that the statute did not extend to all the colonies, and all three declared that they did not think its purpose was to put an end to such marriages by British subjects throughout the world. 9 H. L. Cas. 214, 222, 240.

The second ground, which was suggested by Mr. Justice Cresswell and Lord Wensleydale only, and is opposed to all the American authorities, was that the case justly fell within the first exception, stated in Story, Conf. § 114, of marriages involving polygamy and incest. 3 Sm. & Giff. 513; 9 H. L. Cas. 241, 245. In view of that position, it may be observed that in an earlier case, in which Lord Wensleydale himself (then Baron Parke) delivered the opinion, a marriage of a widower with his deceased wife's sister, before the St. of Will. IV., was prevented from being made irrevocable by that statute, only by the institution, a week before its passage, of a suit for nullity in the Ecclesiastical Court by the father of the supposed wife; and by the

decision of the Privy Council, that because, if the marriage was not set aside, the birth of a child of the marriage would impose a legal obligation upon the grandfather to maintain the child in the event of its being poor, lame, or impotent, and unable to work, he had, according to the rules of the ecclesiastical courts, a sufficient interest, "although of an extremely minute and contingent character," to support such a suit. *Sherwood v. Ray*, 1 Moore P. C. 353, 401, 402.

The third ground, upon which alone all the law lords agreed, was that the St. of Will. IV. made all future marriages of this kind between English subjects, having their domicile in England, absolutely void, because declared by act of Parliament to be contrary to the law of God, and must therefore be deemed to include such marriages, although solemnized out of the British dominions.

The law of England, as thus declared by its highest legislative and judicial authorities, is certainly presented in a remarkable aspect. 1st. Before the St. of Will. IV., marriages within the prohibited degrees of affinity, if not avoided by a direct suit for the purpose during the lifetime of both parties, had the same effect in England, in every respect, as if wholly valid. 2d. This statute itself made such marriages, already solemnized in England, irrevocably valid there, if no suit to annul them was already pending. 3d. It left such marriages in England, even before the statute, to be declared illegal in the Scotch courts, at least so far as rights in real estate in Scotland were concerned. 4th. According to the opinion of the majority of the law lords, it did not invalidate marriages of English subjects in English colonies, in which a different law of marriage prevailed. 5th. But it did make future marriages of this kind, contracted either in England or in a foreign country, by English subjects domiciled in England, absolutely void, because declared by the British Parliament to be contrary to the law of God.

The judgment proceeds upon the ground that an act of Parliament is not merely an ordinance of man, but a conclusive declaration of the law of God; and the result is that the law of God, as declared by act of Parliament and expounded by the House of Lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure.

The case recalls the saying of Lord Holt, in *London v. Wood*, 12 Mod. 669, 687, 688, that "an act of Parliament can do no wrong, though it may do several things that look pretty odd;" and illustrates the effect of narrow views of policy, of the doctrine of "the omnipotence of Parliament," and of the consequent unfamiliarity with questions of general jurisprudence, upon judges of the greatest vigor of mind, and of the profoundest learning in the municipal law and in the forms and usages of the judicial system of their own country.

Such a decision, upon such reasons, from any tribunal, however eminent, can have no weight in inducing a court, not bound by it as authority, to overrule or disregard its own decisions.

The provision of the Gen. Sts. c. 107, § 25, forbidding the guilty party to a divorce to contract another marriage, during the life of the other party, without leave of this court, on pain of being adjudged guilty of polygamy, does not create a permanent incapacity, like one arising from consanguinity or affinity. It is rather in the nature of the imposition of a penalty, to which it would be difficult to give any extra-territorial operation. *West Cambridge v. Lexington*, 1 Pick. 506, 510, 512; *Clark v. Clark*, 8 Cush. 385, 386. Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another State according to its laws, at least without proof that the parties went into that State and were married there with the intent to evade the provisions of the statutes of this Commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor whether the indictment is in due form. See *Commonwealth v. Putnam*, 1 Pick. 136, 139; *Commonwealth v. Hunt*, 4 Cush. 49.

*New trial ordered.*¹

KINNEY v. COMMONWEALTH.

COURT OF APPEALS OF VIRGINIA. 1878.

[*Reported 30 Grattan, 858.*]

CHRISTIAN, J.² The plaintiff in error was indicted in the county court of Augusta County for lewdly associating and cohabiting with Mahala Miller. He was found guilty. . . . The Commonwealth, to sustain the issue on her part, proved to the jury that the defendant, Andrew Kinney, and a certain Mahala Miller, on the 1st day of January, 1877, and from that time to the 27th day of August, 1877, in the county of Augusta and State of Virginia, did live and associate together as man and wife; that said Andrew Kinney is a negro, and said Mahala Miller a white woman, and that in November, 1874, they, as citizens of the State of Virginia, regularly domiciled in the county of Augusta, left their own State for the purpose of being married in the District of Columbia, and in ten days thereafter returned to this State to live, and have since lived together as man and wife in said county of Augusta. The defendant, to sustain the issue on his part, proved that he and the said Mahala Miller were married in the District of Columbia on the 4th day of November, 1874, in accordance with the laws of said district.

¹ *Acc. Scott v. A. G.*, 11 P. D. 128; *Pondsford v. Johnson*, 2 Blatchf. 51; *Phillips v. Madrid*, 83 Me. 205, 22 Atl. 114; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *S. v. Shattuck*, 69 Vt. 403, 38 Atl. 81. *Contra*, *Williams v. Oates*, 5 Ire. L. 535; *Stull's Estate*, 183 Pa. 625, 39 Atl. 16 (but see *Van Storch v. Griffin*, 71 Pa. 240, not cited in the later case); *Pennegar v. S.*, 87 Tenn. 244. And see *Succession of Hernandez*, 46 La. Ann. 962, 15 So. 461. — Ed.

² Part of the opinion is omitted. — Ed.

The court . . . instructed the jury as follows: "That the said marriage of the defendant and said Mahala Miller was, under the circumstances proven, but a vain and futile attempt to evade the laws of Virginia, and override her well-known public policy, and is therefore no bar to this prosecution; to which opinion . . . the defendant, by his counsel, excepts." . . .

The sole question submitted by this bill of exceptions for the adjudication of this court is, Whether the alleged marriage celebrated in the District of Columbia, "in accordance with the laws of said district," as certified in the certificate of facts, is a bar to this prosecution? It is conceded that a marriage in this State between a white person and a negro is void. It is not only prohibited by the statute law, but penalties are imposed for its violation. The first section of chapter 105, Code 1873, provides that "all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void without any decree of divorce or other legal process." In the same section other marriages prohibited by law therein mentioned, are voidable only; that is, declared to be void only from the time they shall be so declared by decree of divorce or nullity. These are cases of marriages within the prohibited degrees of consanguinity or affinity, or where either party was insane or incapable from physical causes. Such marriages are void when declared to be void by decree of divorce or nullity, or when the parties are convicted under the third section of chapter 192, which denounces certain penalties against marriages of parties within the prescribed degrees of consanguinity or affinity. But marriage between a white person and a negro is declared by statute to be absolutely void without any decree of divorce or other legal process. If, therefore, the marriage had been celebrated in this State between Andrew Kinney, who is a negro, and Mahala Miller, who is a white woman, no matter by what ceremonies or solemnities, such marriage would have been the merest nullity, and the parties must have been regarded, under our laws, as lewdly associating and cohabiting together, and obnoxious to the penalties denounced by our statute against this gross offence.

Does the marriage of the parties in the District of Columbia, where marriages between white persons and negroes are not prohibited, present a bar to this prosecution and put the parties on any different footing when arraigned before our tribunals for a violation of the laws of this State? It is admitted that Andrew Kinney and Mahala Miller had their domicile in Augusta County, in this State; that they remained out of the State only ten days after their marriage, and returned here, and that this county is still their domicile.

It is plain to be gathered from the whole record, if not indeed admitted, that these parties, knowing they could enter into no valid marriage contract in this State, went to the city of Washington for the purpose of evading the statute law of this State; were there

married, and in a few days returned to this State. They never changed nor designed to change their domicil. It was here then; it is here now.

The important question, and one of first impression in this State, is: Does the marriage in the District of Columbia, made *in fraudem legis* of this State, protect the parties in a prosecution in this State for a violation of its penal laws in this most important and vital branch of criminal jurisprudence, affecting the moral well-being and social order of this State? Must the *lex loci contractus* or the *lex domicilii* prevail?

There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. The right to regulate the institution of marriage; to classify the parties and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality, and social order demand, has been exercised by all civilized governments in all ages of the world.

It is insisted, however, by the learned counsel for the plaintiff in error, in the ingenious and able argument which he addressed to this court, that conceding the power of every State and country to pass such laws, yet they never act *extraterritorial*, but must be confined, with rare exceptions, to such marriages as are contracted and consummated within the State where they are prohibited. He invokes for his client in this case the rule laid down by jurists and text-writers, that "a marriage valid where celebrated is good everywhere."

This is undoubtedly the general rule. But there are certain exceptions to this general rule, and while in its application and the affirmance of certain exceptions thereto, there was for a long time much confusion in the authorities and conflict in the cases, I think it may now be affirmed that there are exceptions to this general rule as well established and authoritatively settled as the rule itself.¹ . . .

Whatever conflict of authority there may have been on this subject, it may now be affirmed, since the decision of *Brook v. Brook*, 9 H. L. C. 193, that in England, a marriage prohibited by law in that country, between parties domiciled there, and declared by act of Parliament to be absolutely void, is invalid there no matter where celebrated. In this country the same doctrine is affirmed in North Carolina, Louisiana, and Tennessee. See *Williams v. Oates' ex'or*, 5 Ired. R. 535; *State v. Kennedy*, 76 North Car. 251; *State v. Ross*, 76 North Car. 242; 10 La. Ann. 411, *Dupre v. Boulad's ex'or*.

Whenever the question has arisen in the Southern States, it has been held that a marriage between a white person and a negro, although the marriage be celebrated in a State where such marriages are not

¹ The court here cited Story, *Conflict of Laws*, § 113; *Brook v. Brook*, 9 H. L. C. 193. — Ed.

prohibited, is void in the State of the domicile, and when they go to another State temporarily, and for the purpose of evading the law, and return to their domicile, such marriage is no bar to a criminal prosecution. And such is the law of this State. It is now so declared by statute. See Sess. Acts of 1877-8. The statute, however, was passed after the marriage of the parties in this case. But without such statute, the marriage was a nullity. It was a marriage prohibited and declared "absolutely void." It was contrary to the declared public law, founded upon motives of public policy, — a public policy affirmed for more than a century; and one upon which social order, public morality, and the best interests of both races depend. This unmistakable policy of the legislature, founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriage between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across an imaginary line, bid defiance to the law, by immediately returning and insisting that the marriage celebrated in another State or country should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void. No State will permit its citizens to violate its laws by such evasions. But the law of the domicile will govern in such case, and when they return, they will be subject to all its penalties, as if such marriage had been celebrated within the State whose public law they have set at defiance.

There is one American case which is directly opposed to the principles herein declared, the facts of which are precisely the same as in the case before us. It is the case of *Medway v. Needham*, 16 Mass. R. 157, which was strongly relied on by the learned counsel for the plaintiff in error as authority to govern this case. But I think that case is not supported by authority nor grounded on any sound principles of law. That was the case of a marriage between a white person and a negro. The parties were domiciled in Massachusetts, whose laws at that time prohibited such marriages. They went into Rhode Island, where such marriages were lawful, were there married, and returned to Massachusetts. The Supreme Court of that State held the marriage to be valid, and declared, in an elaborate opinion, that "a marriage which is good by the laws of the country where it is celebrated, is valid in every other country; and although it should appear that the parties went into another State to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will nevertheless be valid in the country in which the parties live."

In commenting on this case, the lord chancellor, in *Brook v. Brook* *supra* (219), says: "I cannot think it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which

the forms only of celebrating the marriage in the country of celebration and the country of domicile were different; and he took the distinction between cases where the absolute prohibition of marriage is forbidden on motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I, myself, must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another State in which the marriage is not prohibited, to celebrate a marriage forbidden by their own State, and immediately returning to their own State, to insist on their marriage being recognized as lawful."

Lord Cranworth, referring to the same case, said: "I also concur entirely with my noble and learned friend that the American decision of *Medway v. Needham*, cannot be treated as proceeding on sound principles of law.

"The province or State of Massachusetts positively prohibited by its laws, as contrary to public policy, the marriage of a mulatto with a white woman; and on one of the grounds, pointed out by Mr. Story, such a marriage ought certainly to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful."

With such condemnation, from so high a source, of this decision as authority, and when it is opposed by the decisions of our sister Southern States above referred to, and contrary to sound principles of law, I think, though a case exactly in point upon its facts, it can have but little weight in forming our judicial determination of the question before us in this case.

There is another American case also relied on by the counsel for the plaintiff in error for the doctrine that "a marriage valid where celebrated is valid everywhere." It is a Kentucky case, *Stevenson v. Gray*, reported in 17 B. Monr. R. 193. That was a marriage between a nephew and his uncle's wife. Such a marriage was prohibited in Kentucky, but not in Tennessee. The parties went into Tennessee, and were there married and returned to Kentucky. It was held that the marriage was valid in Kentucky. But it is to be noted that such marriages are not declared by the Kentucky statute absolutely void, but voidable only — that is, to be avoided by judgment of a district court or court of quarterly sessions. The reasoning of the judge who delivered the opinion of the court in that case, shows that he treats the case of a marriage voidable only, and not *ipso facto* void. If such marriage has been declared absolutely void by the Kentucky statute, the decision of the court, no doubt, would have been different.

In the seventh edition of Story's Conflict of Laws, p. 178, the editor adds a section in which he says: The limitation defined by Lord Campbell, chancellor, in *Brook v. Brook*, is certainly characterized by great moderation and good sense; that while the form of the contract,

the rites and ceremonies proper or indispensable for its due celebration, are to be governed by the laws of the place of the contract or of celebration, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Hence, if the incapacity of the parties is such that no marriage could be solemnized between them . . . and, without changing their domicil, they go into some other country where no such limitation or restriction exists, and there enter into the formal relation with a view to return and dwell in the country in which such marriage is prohibited by positive law, it is but proper to say that a proper self-respect (of the State or government in prohibiting such a marriage) would seem to require that the attempted evasion would not be allowed to prevail.

I have thus considered, at length, the authorities, English and American, on this question, because it is one of first impression in this court, and because it is a question which materially affects public morality, social order, and the best interests of both races. The public policy of this State, in preventing the intercommingling of the races by refusing to legitimate marriages between them, has been illustrated by its legislature for more than a century. Every well-organized society is essentially interested in the existence and harmony and decorum of all its social relations. Marriage, the most elementary and useful of all, must be regulated and controlled by the sovereign power of the State. The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished Southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

Upon the whole case, I am of opinion that the marriage celebrated in the District of Columbia between Andrew Kinney and Mahala Miller, though lawful there, being positively prohibited and declared void by the statutes of this State, is invalid here, and that said marriage was a mere evasion of the laws of this State, and cannot be pleaded in bar of a criminal prosecution here.

If the parties desire to maintain the relations of man and wife, they must change their domicil and go to some State or country where the laws recognize the validity of such marriages.

Upon the whole case, I am of opinion that there is no error in the judgment of the circuit court affirming the judgment of the county court, and that both be affirmed by this court.

The other judges concurred in the opinion of Christian, J.

*Judgment affirmed.*¹

¹ *Acc. S. v. Tutty*, 41 Fed. 753; *Dupre v. Boulard*, 10 La. Ann. 411; *S. v. Kennedy*, 76 N. C. 251. But see *Pearson v. Pearson*, 51 Cal. 120. — Ed.



SECTION III.

LEGITIMACY AND ADOPTION.

IN RE GROVE.

COURT OF APPEAL. 1888.

[*Reported 40 Chancery Division, 216.*]

FURTHER CONSIDERATION. This was an action for the administration of the estate of Caroline Emilia Grove, a domiciled Englishwoman, who died on the 29th of October, 1866, at the age of eighty-eight, a lunatic and intestate, and possessed of considerable personal estate.

In October, 1867, as no next of kin appeared to claim her estate, letters of administration were granted to the Solicitor to the Treasury; and the Treasury shortly afterwards took possession of the estate.

Two sets of persons subsequently set up conflicting claims to the estate as next of kin of the intestate, *i. e.* the Vaucher family and the Falquet family, and this action was brought by a member of the former family in 1884.

In the course of the proceedings an inquiry was directed as to who were the next of kin of the intestate, and evidence was gone into from which it appeared that both the Vaucher family and the Falquet family claimed through the same man, Marc Thomegay, and the same woman, Martha Powis, under the following circumstances :—

Marc Thomegay, who was the grandfather of the intestate, was born in Geneva of Swiss parents, in the year 1712, and there was no question that his domicile of origin was Genevese. On the 13th of August, 1728, he was received as a burgess of Geneva. In 1729, his father, who was a watchmaker, died in Geneva. Marc Thomegay was a worker in gold and silver, and in 1734, being then twenty-two years of age, he came to England, where he remained until his death in 1779. In the year 1743 a private Act of Parliament was passed, whereby Peter Thomegay, the brother of Marc Thomegay, and four other foreigners were naturalized as subjects of Great Britain, but this act did not include and made no mention of Marc Thomegay.

Some time after the arrival of Marc Thomegay in England, he formed a connection with an Englishwoman named Martha Powis; he

cohabited with her, for several years, and had by her three illegitimate children, viz., Sarah, who was born on the 5th of February, 1744, and was baptized on the 24th of the same month by the name of Sarah Thomegay, in the church of St. Mary, Whitechapel, where he presented her under his own name and as his daughter; a son, who was born on the 11th of January, 1745, and was baptized on the 16th of February following, in the same church; and another daughter, who was born on the 14th of November, 1747, and was baptized on the 13th of December following, in the parish church of Barking in Essex. These two children were also baptized under their father's name, and as his children.

Sarah Thomegay, on the 19th of December, 1768, married M. Delom, a citizen of Vevey, and she was the ancestress of the Vaucher family.

Elizabeth Thomegay married a M. Courbel, a citizen of Geneva.

On the 22d of May, 1749, Marc Thomegay was married to an Englishwoman named Elizabeth Woodhouse, in the church of St. Pancras; of this marriage there was issue one child, viz. Margaret Sarah Thomegay, who was born on the 22d of December, 1749, and was baptized on the 13th of January, 1750, in the church of St. Leonard's, Shoreditch. Margaret Sarah Thomegay, on the 13th of June, 1788, married an Englishman named William Grove, and she died in London in the year 1792, having had issue one child only, viz. the intestate Caroline Emilia Grove.

Elizabeth Woodhouse died on the 26th of March, 1752, and on the 2d of February, 1755, Marc Thomegay married Martha Powis, by whom he had formerly had the three illegitimate children above mentioned.

Of this marriage there was issue four children, one of whom died in infancy. The others were Jean, who was born on the 5th of October, 1756, and was baptized on the 29th of the same month in the church of Westham, Essex; Richard, who was born on the 11th of February, 1762, and was baptized on the 1st of March following, in the church of St. Leonard's, Shoreditch; and Sophie Martha, who was born on the 12th of November, 1764, and was baptized on the 7th of December following, in the same church.

Of these three children, Sophie Martha was the only one who left issue, and she in 1791 married Jean Louis Falquet, and was the ancestress of the Falquet family.

Martha Thomegay (*née* Powis) died in the year 1772.

In the year 1774 Marc Thomegay presented a petition to the Council of Geneva, apparently in the interest of his three children by Martha Powis before his marriage with her, in which he stated "that in 1734 he went to England, where he now is, that one of the first ties he formed was an attachment for Miss Martha Powis, whom he intended to marry as soon as fortune would allow him to do so; that thwarted by circumstances and encouraged by their intention to marry one another as soon as those circumstances would permit, they yielded and

lived together for several years as husband and wife; that of this intercourse they had three children." Then after stating the names and dates of the births and baptisms of these children, as above set forth, he stated "that very extraordinary circumstances thwarted the resolution he had formed to marry Martha Powis, and induced him to marry Miss Elizabeth Woodhouse," and stated the death of his wife Elizabeth and his subsequent marriage with Martha Powis. Then the petition stated, *inter alia*, that the petitioner, having been informed that in Geneva, his native country, subsequent marriage legitimized illegitimate-born children, made application in order to prove, by the certificates there mentioned, the births of his son Marc, and his daughters Sarah and Elizabeth, praying the Council to grant him record of his proofs and declarations, so that no one might question to his above-mentioned three children, their condition of legitimate children in Geneva, his native country. An order was made by the Council granting record accordingly, and the births of these three children were entered in the register of births of children of Genevese parents born in foreign parts. •

The statements contained in this petition were borne out by the certificates attached thereto, and these certificates were put in evidence in this action.

Marc Thomegay made his will on the 9th of March, 1779, describing himself as of Tottenham, in the county of Middlesex, and died on the 2d of December, 1779. From the will it appeared that he was carrying on business in partnership with his son, and was entitled to a leasehold house, workshops, and premises in Moorfields, within the parish of St. Leonard's, Shoreditch. It did not appear when this lease was granted, but in the baptismal certificates of 1744 and 1745 the parents were described as of Ayliffe Street, and Moorfields was not mentioned in any certificate until the year 1750.

There was evidence that according to the laws of the canton of Geneva illegitimate children are legitimated by the subsequent marriage of their father and mother, notwithstanding the intervening marriage of their father with another woman.

The Chief Clerk, by his certificate made in this action, in substance left to the court the question whether under these circumstances Sarah Delom and the other two children born of Marc Thomegay and Martha Powis during their cohabitation were to be taken as legitimate or not; and found that if Sarah Delom ought to be treated as legitimate, then the next of kin of the intestate were the descendants of the said Sarah Delom, who were represented by the plaintiff, and that if not, such next of kin was the Falquet family.

The further consideration came on for hearing before Mr. Justice STIRLING on the 20th of July, 1887.¹

The plaintiff appealed [from the judgment of STIRLING, J].

¹ The arguments and the decision of Mr. Justice STIRLING are omitted. — ED.

FRY, L. J.¹ I agree entirely with the conclusion arrived at by the Lord Justice, and I am glad to say that I also agree in the law which he has laid down, but the facts of the case influence my mind somewhat differently, and I pick my way through those facts to the same conclusion by a somewhat different course. I will, therefore, endeavor to state, as briefly as I can, the view I take of this case.

The appellant claims through Sarah Thomegay, who was born in 1744, in this country, and was an illegitimate child of Marc Thomegay and Martha Powis. At birth that child took the domicile of its mother and it took the status of illegitimacy, according to the law of the domicile of its mother, and it took also the capacity to change that status of illegitimacy for one of legitimacy, provided that according to the law of the domicile of the father, the subsequent marriage would work legitimation. The position of such a child, therefore, is curious, taking domicile and status from the mother, but taking the potentiality of changing its status from the putative father. That I take to be the law applicable to this case, and that gives rise to the first question, what was the domicile of the father in the year 1744?

It must be taken that the domicile of the father was Genevese at the date of the birth of Sarah in 1744. If his domicile were English, there would be an end of the case; if the domicile were Genevese, as I hold, then arises the second question, which is this: What was his domicile at the date of the subsequent marriage of the parents in 1755? It appears to me that the domicile governs the effects of the marriage. That I take to be the general law, and it is so laid down by Mr. Justice Story, in the 189th paragraph of his work on Conflict of Laws: "In a general sense the law of the matrimonial domicile is to govern in relation to the incidents and effects of marriage." If, therefore, the subsequent marriage was governed by the English domicile it would seem to follow that no legitimation can take effect. If, on the contrary, the subsequent marriage is governed by Genevese domicile, it would seem that subsequent legitimation does take effect. It may be, though on this point no evidence has been adduced, that the Genevese law would recognize an English marriage as legitimating the previously born issue. Whether that be so or not I do not know, but even if it be, my conclusion is, that we should not follow the Genevese law, if it gave a greater effect to a marriage contract in England when the parents have an English domicile, than the English law gave to it; and for this reason, that the State imposes on all persons domiciled in it, its own conclusions as to the effect of marriage. Here again I would refer to the same paragraph in Mr. Justice Story's Conflict of Laws, where, citing the judgment of Lord Robertson, a Scotch judge, he says: "Marriage is a contract *sui generis*; and the rights, duties, and obligations which arise out of it are matters of such importance to

¹ Concurring opinions of CORROW and LOPES, L.JJ., are omitted. They differed from FRY, L. J., in holding that Thomegay was domiciled in England at the birth of Sarah. Part of the opinion of FRY, L. J., is omitted. — Ed.

the well-being of the State, that they are regulated not by the private contract, but by the public laws of the State, which are imperative on all who are domiciled within its territory." I would remark again, that I entirely agree with what has been said by Lord Justice Cotton, with regard to the effect of the cases of *Munro v. Munro*, 7 Cl. & F. 842, and *Udny v. Udny*, Law Rep. 1 H. L. Sc. 441, on this question of law, and I think that they very strongly support the conclusion which I have endeavored to express.

Now, that being so, we come back to the question of fact, where was Marc Thomegay domiciled in 1755 when he contracted marriage with Martha Powis? In my judgment his domicile was English. . . . and that consequently the English law of marriage must govern the effects of the marriage then contracted, and that English law would not allow subsequent legitimation. I come, therefore, to the same conclusion, though by a somewhat different course, as that of my learned brother.

*Appeal dismissed with costs.*¹

SCOTT v. KEY.

SUPREME COURT OF LOUISIANA. 1856.

[Reported 11 *Louisiana Annual*, 232.]

BUCHANAN, J.² This cause has already been before this court, and was remanded to make proper parties defendant. See 9 La. Ann. 213.

Plaintiffs are the surviving brother and sisters of Samuel Estill, deceased, and the children of a deceased brother of said Samuel. They claim to be heirs at law of Samuel Estill. The defendants are the curator, and the half-brothers and sisters, heirs of one William Estill, who was a natural son of Samuel Estill, but legitimated by a statute of the State (then territory) of Arkansas, of which Samuel and William Estill were at the time residents, passed October 27th, 1835, and entitled "an act to legitimize the son of Samuel Estill." For a copy of the said statute in full, see the report of this case in 9th La. Annual.

The question now presented for our decision is, whether the statute in question had an extraterritorial effect, and enabled William Estill to inherit, as the legitimate son of Samuel Estill, the property left by the latter in Louisiana. The solution of this question appertains to a distinction (which has been recognized by various decisions of the Supreme Court of Louisiana) of statutes real and statutes personal. The leading case on this subject is *Saul v. His Creditors*, 5 Mart. n. s., in which it was decided, that the general law of Virginia, which renders

¹ Acc. *Munro v. Munro*, 1 Robt. H. L. 492; *Smith v. Kelly*, 23 Miss. 167; *Miller v. Miller*, 91 N. Y. 315; *Dayton v. Adkisson*, 45 N. J. Eq. 603, 17 Atl. 964. — Ed.

² The statement of facts, arguments, and dissenting opinion are omitted. — Ed.

property acquired during marriage the property of the husband, is a real statute, which did not follow a couple, who had contracted marriage in Virginia, into the State of Louisiana, where they resided many years, and where the wife died; but that property acquired in Louisiana after their removal thither, entered into the matrimonial partnership of our law, and on the dissolution of the marriage, belonged one-half to the wife's heirs. And in the case of *Banna v. Alpuente*, 6 Mart. n. s. (the same judge, Porter, who had, in the case of *Saul*, reviewed all the authorities, being the organ of the court), it was decided that the laws of domicile of origin govern the state and condition into whatever country the party removes; in other words, that such laws are personal statutes. And those two decisions are in harmony with the definition by Chief Justice Eustis, of the real and personal statute, in the case of the *Augusta Insurance Company v. Morton*, in 3 La. Ann. 426: "Those laws are real," says the learned judge, "in contradistinction to personal statutes which regulate directly property, without reference to the condition or capacity of its possessor." There are some expressions of Judge Strawbridge, in the case of *Brosnahan v. Turner*, 16 La. 439, which are relied upon by plaintiffs' counsel, and which are scarcely consistent with this definition. But the decision in *Brosnahan v. Turner* turned upon a totally different point, the validity of a sheriff's sale. The remarks in *Brosnahan v. Turner*, as to the incapacity of the testamentary heirs of Villarude to inherit in Louisiana, under a will probated under the authority of a statute of Florida, are at best but *obiter dicta*, and besides refer to a very different state of facts from that presented in this case. Here, an infant, or minor, son of a resident of Arkansas, born out of wedlock, was, by an act of the legislature of the country of his domicile, legitimated, or put upon the same footing as if his parents had been married at the time of his birth.

It is admitted of record, that William Estill, then a small child, October 27, 1835, resided with his natural father, Samuel Estill, in Arkansas, who was then a citizen of Arkansas, and resided in Arkansas, and that both of them resided therein for several years before 1835, and also continued to reside in Arkansas until some time between 1837 and 1841." Arkansas was then the *bona fide* domicile of the Estills, at the time of the passage of the act of the legislature in question. William was, by law, the legitimate son of Samuel in Arkansas. Can it be said that he lost his status by crossing the State line into the frontier parish of Carroll, some years afterwards? We think not. The heritable quality of legitimacy which he had received from the legislature of the State of his residence accompanied him when he changed his domicile.

The error of the judgment appealed from consists in regarding William Estill as illegitimate, at the time of his father's death. But he was not so. The original taint of illegitimacy had been removed by the act of the legislature. Legitimacy and illegitimacy are the result of positive laws, which differ very materially in different countries.

To illustrate this idea, suppose William Estill had been born in Louisiana, and that after his birth his father and mother had got married in Louisiana, and subsequently to their marriage removed with their child to Arkansas. Their marriage after his birth would have legitimated their offspring by the law of their domicil; yet by the law of Arkansas a subsequent marriage would have not produced that effect. Nevertheless, the status of legitimacy being acquired in Louisiana would have accompanied him into Arkansas. There are many precedents, in the legislation of various States of this Union, of legitimation by act of the legislature, and particularly in Louisiana. This seems identical with the legitimation *per rescriptum principis* of the Roman law.

Voet, Commentarius ad Pandectas, lib. 25, tit. 7, §§ 4 and 13.

If it is true that a general law of the place of domicil, changing the status of its citizens according to circumstances, is a personal statute, accompanying the party to every other country, provided the circumstances which operate such change have occurred before the change of domicil, which we consider to be the doctrine settled in Louisiana, *a fortiori*, is a special law, removing a disability from a particular citizen by name, such a statute? The constitutional power of the legislature to enact such exceptional enabling statutes was drawn directly in question, and ruled affirmatively, in the case of Pritchard v. Citizens Bank, 8 La. 133. The maxim cited by Story, Conflict of Laws, § 51, from Boullenois, "Habilis vel inhabilis in loco domicilii, est habilis vel inhabilis in omni loco," must therefore be deemed law in Louisiana.

And is it not correct to say, that the statute of Arkansas, to legitimate William Estill (which is a personal statute), conflicted with the statute of distributions of Louisiana (which is a real statute); and consequently, as was held in Saul's case, is overruled by the latter statute? By the Louisiana statute of distributions, the legitimate son inherits in preference to the brothers and sisters of the deceased. By the effect of the statute of Arkansas, William Estill was the legitimate son of Samuel Estill. Upon the demise of Samuel Estill in Louisiana, in 1849, fourteen years after that statute, William Estill, as his legitimate son, was his heir, by the law of Louisiana.

In confirmation of this view of the subject, we may quote the language of the High Court of Errors and Appeals of Mississippi, in the case of Smith v. Kelly, 23 Miss. Rep., 170: "It is a well settled principle, that the status or condition, as to the legitimacy, must be determined by reference to the law of the country where such status or condition had its origin."

Judgment of the District Court reversed; and judgment for defendants, with costs in both cases.

SPOFFORD, J. It was competent for the legislature of Arkansas, the domicil of its origin, to fix the status of William Estill.

In substance and effect, that legislature gave him the *status* of a legitimate son of Samuel Estill.

The Arkansas statute, legitimating William Estill, was a personal statute.

Therefore, the status of a legitimate son of Samuel Estill would accompany William Estill into whatever country he might go.

He came hither with the status. He inherited, by our law, from his father, Samuel Estill, because he was to all intents and purposes a legitimate son, having become so by the law of the domicil of his origin, and not in fraud of our law, nor in violation of its policy.

I, therefore, concur in the opinion and judgment of Mr. Justice BUCHANAN.

MERRICK, C. J., dissenting.

BARNUM v. BARNUM.

COURT OF APPEALS OF MARYLAND. 1875.

[*Reported 42 Maryland, 251.*]

THIS was a bill for the distribution of the property of David Barnum. John R. Barnum claimed a distributive share as grandson of David and son of Richard Barnum. John R. Barnum was born in Arkansas, while his father was domiciled there; the court, however, decided, that his parents were not married, and that he was illegitimate. He having died during the progress of the suit, his representative appealed.¹

ALVEY, J. It is contended that notwithstanding there may have been no marriage between Dr. Barnum and Caroline Butler, yet by the operation of the act of the legislature of Arkansas, before referred to, John R. Barnum was rendered legitimate, as if a valid marriage had taken place, and was therefore capable of taking whatever right that would or could devolve on any legitimate child of his father; that the act was retroactive, and related back to the time of the birth of the child declared to be heir.

In this, however, we do not agree with the counsel of the claimants. As we have seen, the act makes no reference to any marriage, and in no sense could operate to confirm any defective or imperfect marriage. Its operation does not even depend upon the fact that John R. Barnum was the child of Richard Barnum. It simply, by force of the law itself, and not of the circumstances of birth or relationship, gave to John R. Barnum a personal status, with capacity to inherit from Richard Barnum as heir. This act could have no extraterritorial operation whatever, except as to any rights that may have been acquired under it, in the State of Arkansas. As to such rights they would be respected everywhere. *Sto. Conf. L.*, § § 101, 102. But as to capacity to acquire property beyond the State passing the act, by virtue of the particular status given the party, that the legislature could not confer. Even if the act had professed to legitimate John R. Barnum, without

¹ This short statement is substituted for that of the reporter. Only so much of the opinion as discusses the legitimacy of John R. Barnum is given. — Ed.

reference to previous marriage, it could have no operation here, and no rights involved in this case could be affected by it. This would seem to be clear both on reason and authority. 5 Com. Dig. Parliament (K), p. 301; *Birtwhistle v. Vardill*, 5 B. & Cr., 438; *Houlditch v. Marquess of Donegall*, 2 Clark & Finn., 476; *Smith v. Derr's Adm'rs*, 34 Penn. St., 126; *Sto. Confl. L.*, §§ 87, 87 a.

The claim, therefore made in the right of John R. Barnum, must be rejected.¹

ROSS v. ROSS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1880.

[Reported 129 *Massachusetts*, 243.]

GRAY, C. J.² This case presents for adjudication the question which it was attempted to raise in *Ross v. Ross*, 128 Mass. 212, namely, whether a child adopted, with the sanction of a judicial decree, and with the consent of his father, by another person, in a State where the parties at the time have their domicile, under statutes substantially similar to our own, and which, like ours, give a child so adopted the same rights of succession and inheritance as legitimate offspring in the estate of the person adopting him, is entitled, after the adopting parent and the adopted child have removed their domicile into this Commonwealth, to inherit the real estate of such parent in this Commonwealth upon his dying here intestate.

The question how far a child, adopted according to law in the State of the domicile, can inherit lands in another State, was mentioned by Lord Brougham in *Doe v. Vardill*, 7 Cl. & Fin., 895, 898, and by Chief Justice Lowrie in *Smith v. Derr*, 34 Penn. St. 126, 128, but, so far as we are informed, has never been adjudged. It must therefore be determined upon a consideration of general principles of jurisprudence, and of the judicial application of those principles in analogous cases.

As a general rule, when no rights of creditors intervene, the succession and disposition of personal property are regulated by the law of the owner's domicile. It is often said, as in *Cutter v. Davenport*, 1 Pick. 81, 86, cited by the tenent, to be a settled principle, that "the title to and the disposition of real estate must be exclusively regulated by the law of the place in which it is situated." But so general a statement, without explanation, is liable to mislead. The question in that case was of the validity of an assignment of a mortgage of real estate; and there is no doubt that by our law the validity, as well as the form, of any instrument of transfer of real estate, whether a deed or a will, is to be determined by the *lex rei sitæ*. *Goddard v. Sawyer*,

¹ Acc. *Lingen v. Lingen*, 45 Ala. 410. — Ed.

² Part of the opinion only is given. — Ed.

9 Allen, 78; *Sedgwick v. Laffin*, 10 Allen, 430, 433; *United States v. Crosby*, 7 Cranch, 115; *Clark v. Graham*, 6 Wheat. 577; *Kerr v. Moon*, 9 Wheat. 565; *McCormick v. Sullivant*, 10 Wheat. 192.

It is a general principle, that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and that this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is indeed to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but, in either case, it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status.

The capacity or qualification to inherit or succeed to property, which is an incident of the status or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others. A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding from a capacity to act. Generally speaking, the validity of a personal contract, even as regards the capacity of the party to make it, as in the case of a married woman or an infant, is to be determined by the law of the State in which it is made. *Milliken v. Pratt*, 125 Mass. 374, and authorities cited.¹

The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the law of England or of Scotland, but was recognized by the Roman law, and exists in many countries on the continent of Europe which derive their jurisprudence from that law. *Co. Lit.* 7 b, 237 b; 4 *Phillimore*, § 531; *Mackenzie's Roman Law*, 120-124; *Whart. Confl.* § 251. It was long ago introduced, from the law of France or of Spain, into Louisiana and Texas, and more recently, at various times and by different statutes, throughout New England, and in New York, New Jersey, Pennsylvania, and a large proportion of the other States of the Union. *Fuselier v. Masse*, 4 La. 423; *Vidal v. Commagère*, 13 La. Ann. 516; *Teal v. Sevier*, 26 Tex. 516; *Miss. St.* 1846; *Hutch. Miss. Code*, 501; *Alabama Code of 1852*, § 2011; *N. Y. St.* 1873, c. 830;

¹ The court, in omitted portions of the opinion, cited and discussed at length the following cases, among others: *Doe v. Vardill*, 2 Cl. & F. 571; *Shedden v. Patrick*, 5 Paton, 194, 1 Macq. 535; *Strathmore Peerage*, 6 Paton, 645; *Ross v. Ross*, 4 Wils. & Sh. 289; *Don's Estate*, 4 Drewry, 194; *Skottowe v. Young*, L. R. 11 Eq. 474; *Loring v. Thorndike*, 5 All. 257; *Smith v. Kelly*, 23 Miss. 167; *Scott v. Key*, 11 La. Ann. 232; *Barnum v. Barnum*, 42 Md. 251; *Smith v. Derr*, 34 Pa. St. 126; *Harvey v. Ball*, 32 Ind. 98; *Lingen v. Lingen*, 45 Ala. 410; *Com. v. Nancrede*, 32 Pa. St. 389; *Shafer v. Eneu*, 54 Pa. St. 304. — Ed.

N. J. Rev. Sts. of 1877, § 1345; Penn St. 1855, c. 456; *Purd. Dig.* 61; 1 *Southern Law Rev.* (N. S.) 70, 79 and note, citing statutes of other States. One of the first, if not the very first, of the States whose jurisprudence is based exclusively on the common law, to introduce it, was Massachusetts. . . .

The statute of Pennsylvania of 1855, which is made part of the case stated, and under which the demandant was adopted by the intestate in 1871, while both were domiciled in that State, corresponds to these statutes of this Commonwealth in most respects. Like them, it permits any inhabitant of the State to petition for leave to adopt a child; it requires the petition to be presented to a court in the county where the petitioner resides; it requires the consent of the parents or surviving parent of the child; it authorizes the court, upon being satisfied that it is fit and proper that such adoption should take effect, to decree that the child shall assume the name, and have all the rights and duties of a child and heir, of the adopting parent; and it makes the record of that decree evidence of that fact.

The statute of Pennsylvania differs from our own only in not requiring the consent of the petitioner's wife, and of the child if more than fourteen years of age; in omitting the words "as if born in lawful wedlock" in defining the effect of the adoption; in also omitting any exception to the adopted child's capacity of inheriting from the adopting parent; and in expressly providing that, if the adopting parent has other children, the adopted child shall share the inheritance with them in case of intestacy, and he and they shall inherit through each other as if all had been lawful children of the same parent. . . .

The law of the domicile of the parties is generally the rule which governs the creation of the status of a child by adoption. *Foster v. Waterman*, 124 Mass. 592; 4 *Phillimore*, § 531; *Whart. Conf.* § 251. The status of the demandant, as adopted child of the intestate, in the State in which both were domiciled at the time of the adoption, was acquired in substantially the same manner, and was precisely the same so far as concerned his relation to, and his capacity to inherit the estate of, the adopting father, as that which he might have acquired in this Commonwealth had the parties been then domiciled here. In this respect, there is no conflict between the laws of the two Commonwealths. The difference between them in regard to the consent of the wife of the adopting father, and to the inheritance of estates limited to heirs of the body, or inheritance from the kindred, or through the children, of such father, are not material to this case, in which the only question is whether the adopted child or a brother of the adopting father has the better title to land in the absolute ownership of such father at the time of his death. Whatever effect the want of formal consent, on the part of the wife of the intestate, to the adoption of the demandant, might have, if she were claiming any interest in her husband's estate, it can have no bearing upon this controversy between the adopted child and a collateral heir.

The tenant in his argument laid much stress on the words of the statute of descents and of the statutes of adoption of this Commonwealth.

The statute of descents which was in force at the time of the death of the intestate in 1873 enacts that when a person dies intestate, seised of any real estate, it shall descend, subject to his debts, and saving rights of homestead, "in the manner following: First. In equal shares to his children, and to the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants," etc. "Second. If he leaves no issue, then to his father. Third. If he leaves no issue nor father, then in equal shares to his mother, brothers, and sisters," etc. "Eighth. If the intestate leaves a widow and no kindred, his estate shall descend to his widow; and if the intestate is a married woman and leaves no kindred, her estate shall descend to her husband. Ninth. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to the Commonwealth." Gen. Sts. c. 91, § 1. See also St. 1876, c. 220.

But this section must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child, or a widow, or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere. The words "children" and "child," for instance, in the first clause, "issue," in the phrase "if he leaves no issue," in subsequent clauses, and "kindred," in the last two clauses of this section, clearly include a child made legitimate by the marriage of its parents and acknowledgment by the father after its birth under § 4 of the same chapter, or a child adopted under the provisions of c. 110 of the General Statutes, or c. 310 of the Statutes of 1871.

These statutes, after providing how a child may be adopted in this Commonwealth with the sanction of a decree of the Probate Court in the county in which the adopting parent resides (or, under the St. of 1871, in the county where the child resides if the adopting parent is not an inhabitant of this Commonwealth), enact that a child "so adopted" shall be deemed, for the purpose of inheritance, and other legal consequences of the natural relation of parent and child, to be the child of the parent by adoption. St. 1851, c. 324, § 6; Gen. Sts. c. 110, § 7; St. 1871, c. 310, § 8. It is argued that the words "so adopted" imply that children otherwise adopted are incapable of inheriting lands in this Commonwealth. But it appears to us that these words, in the connection in which they stand, warrant no such implication; and that the legislature, throughout these statutes, had solely in view adoption by or of inhabitants of this Commonwealth, and did not intend either to regulate the manner, or to define the effects, of adoption by and of inhabitants of other States according to the law of their domicile.

We are not aware of any case, in England or America, in which a change of status in the country of the domicil, with the formalities prescribed by its laws, has not been allowed full effect, as to the capacity thereby created of succeeding to and inheriting property, real as well as personal, in any other country the laws of which allow a like change of status in a like manner with a like effect under like circumstances.

We are therefore of opinion that the legal status of child of the intestate, once acquired by the demandant under a statute and by a judicial decree of the State of Pennsylvania, while the parties were domiciled there, continued after their removal into this Commonwealth, and that by virtue thereof the demandant is entitled to maintain this action.

It is worthy of mention (although it cannot of course affect the rights of inheritance which had absolutely vested on the death of the intestate; *Tirrel v. Bacon*, 3 Fed. Rep. 62) that by a recent statute of this Commonwealth "any inhabitant of any other State, adopted as a child in accordance with the laws thereof, shall, upon proof of such fact, be entitled in this Commonwealth to the same rights, as regards succession to property, as he would have enjoyed in the State where such act of adoption was executed, except in so far as they conflict with the provisions of this act." St. 1876, c. 213, § 11.

*Judgment for the demandant.*¹

BLYTHE v. AYRES.

SUPREME COURT OF CALIFORNIA. 1892.

[Reported 96 California, 532.]

GAROUTTE, J.² This is an action instituted under section 1664 of the Code of Civil Procedure by the plaintiff, a minor, through her guardian, to determine the heirship and title to the estate of Thomas H. Blythe, deceased. . . . Plaintiff's claim is based upon sections 230 and 1387, respectively, of the Civil Code of California. Section 230 reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Section 1387, as far as it pertains to the matters involved in this litigation, provides: "Every illegitimate child is an heir of the

¹ *Acc. Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628; *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596; *Melvin v. Martin*, 18 R. L. 650, 30 Atl. 467. And see *Estate of Sunderland*, 60 Ia. 732, 13 N. W. 655. — ED.

² Part of the opinion is omitted. — ED.

person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." . . .

The facts found by the court which face us while we are engaged in a consideration of the first branch of this subject may be succinctly and substantially stated as follows: (1) That plaintiff was born in England, upon December 18, 1873, and was the issue of Thomas H. Blythe and Julia Perry; (2) that Julia Perry was a native of England, domiciled therein, and continued to there reside until one month after the death of said Blythe; (3) that plaintiff remained in England until after the death of Blythe, when she came to California, and said Blythe was never at any time within any of the countries of Europe after the 29th day of August, 1873; (4) that said Blythe was a citizen of the United States and of the State of California, domiciled in said State, and died intestate therein April 4, 1883, leaving surviving him no wife, no father, no mother, and no child, save and except said Florence Blythe, the plaintiff herein; (5) that said Thomas H. Blythe and said Julia Perry never were married, and said plaintiff was begotten while said Blythe was temporarily sojourning in England, and was born after said Blythe's return to California, and that said Blythe never was married.

Before passing to the merits of the discussion, we pause a moment to say that the verb "adopts," as used in section 230, is used in the sense of "legitimizes," and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists. (See law dictionaries, — Bouvier's, Black's, Anderson's, and Rapalje's.) This is the distinguishing feature between adoption and legitimation, as recognized by all the standard law writers of the day who have written upon the subject; and, for the reason that the text writers and the decisions of courts to which we shall look for light and counsel treat the subject as a question of legitimation, we shall view the matter from that standpoint.

The section is broad in its terms. It contains no limitations or conditions, and, to the extent of the power vested in the legislature of the State, applies to all illegitimates, wherever located, and wherever born. The legislature has not seen fit to make any exception to its operation, and, as was said by Taney, C. J., in *Brewer v. Blougher*, 14 Pet. 178, when considering a quite similar provision of a statute: "In the case before us the words are general, and include all persons who come within the description of illegitimate children; . . . and when the legislature speaks in general terms of children of that description, without making any exceptions, we are bound to suppose they design to include the whole class." Bar, in his work on International Law (page 434), says: "Legitimation of bastards, either by subsequent marriage or by an act of the government (*rescriptum principis*), is nothing but a legal equalization of certain children illegitimately begotten with

legitimate children." In other words, the object and effect of section 280 is to change the status and capacity of an illegitimate child to the status and capacity of a child born in lawful wedlock. . . .

The contention of appellants that the status of a person residing in a foreign country, and a subject thereof, cannot be changed by acts performed in California under a provision of the law of our State legislature, cannot be supported as a rule without many exceptions, and to the extent of those exceptions a State law must be held, by its own courts at least, to have extraterritorial operation; and this principle of the foreign operation of State laws even goes to the extent that in many instances such laws are recognized and given effect by the courts of that particular foreign jurisdiction. The doctrine of extraterritorial operation of State laws is fully exemplified in the case of *Hoyt v. Thompson*, 5 N. Y. 340. . . .

Section 215 of the Civil Code is as follows: "A child born before wedlock becomes legitimate by the subsequent marriage of its parents." This section takes a wide range. Its operation is not confined within State lines. It is as general as language can make it. Oceans furnish no obstruction to the effect of its wise and beneficent provisions; it is manna to the bastards of the world. If Blythe, subsequent to the birth of plaintiff, had returned to England, and married Julia Perry, such marriage, under the provision of law just quoted, *ipso facto* would have resulted in the legitimation of Florence Blythe. Then, in answer to the interrogatory of appellants already noticed, we say that she was so domiciled that by the laws of California she could have been changed from bastardy to legitimacy. Our statute, conjoined with principles of international law, would have changed her bastardy to legitimacy in the world at large; and regardless of international law, and regardless of all law of foreign countries, our statute law alone would have made her legitimate in the world at large, whenever and however that question should present itself in the courts of California. And we also have here a most striking illustration of the extraterritorial operation of California law. We have the effect of a statute of this State attaching to a state of facts where the mother and child were never in California, but residing and domiciled in England, and the marriage taking place in England; and California law, as stated, has the effect upon that child to give it a different domicile, and completely change its status. Such would not only be the effect of this law upon the child viewed by California courts, but such would be its effect viewed by the courts of England, where the child was domiciled, and that, too, notwithstanding no provisions of law are there found for the legitimation of bastards. This assumption of Blythe's marriage to Julia Perry, in its facts, forms an exact photograph of the celebrated case of *Munro v. Munro*, found in 1 Rob. App. 492; a case crystallizing the judicial thought of the age upon the subject, and commanding the respect of all writers and judges upon the law of domicile. . . .

Appellants insist that the domicile of the child irrevocably fixes that child's status. In this case, subsequent to the child's birth, Julia Perry

married a domiciled Englishman; hence her domicil was permanently established in England, and for that reason the child's domicil, being the mother's domicil, was permanently established there. Under appellants' reasoning this state of facts would forever debar the child from legitimation, for even its presence in California would avail nothing as against its English domicil. If such be good law, section 226 of the Civil Code, expressly authorizing the adoption of minors of other States, is bad law, for it is squarely in conflict with those views. . . .

We have quoted thus extensively from the authorities upon the subject of domicil as specially bearing upon the question of *legitimatio per subsequens matrimonium* for the reason that we are unable to perceive any difference in the general principles of law bearing upon that character of legitimation and in those principles bearing upon other forms of legitimation authorized by the same statute. The only distinction claimed by appellants is that legitimation founded upon subsequent marriage is based upon the fiction of law that a previous consent existed, and the marriage related back to that time. Upon this point it would seem all-sufficient to say that our statute does not recognize such a fiction, and its effective operation in no wise depends upon the assumption of its presence. Times are not what they once were, and we live in an age too practical to build our law upon the unstable foundation of fictions. . . .

Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this State authorize and encourage it, and there is no principle upon which California law and policy, when invoked in California courts, shall be made to surrender to the antagonistic law and policy of Great Britain. . . .

Plaintiff was the child of Blythe, who was a domiciled citizen of the State of California. She founds her claim upon the statutes of this State, and is now here invoking the jurisdiction of the courts of this State. It is a question of California law, to be construed in California courts, and we see nothing in our constitution or statutory law, or in international law, to have prevented Blythe from making the plaintiff his daughter in every sense that the word implies. In conclusion, we hold that Blythe, being domiciled in the State of California both at the time of the birth of plaintiff and at the time he performed the acts which it is claimed resulted in the legitimation of plaintiff, and California law authorizing the legitimation of bastards by the doing of certain acts, it follows that Florence Blythe, the plaintiff, at all times was possessed of a capacity for legitimation under section 230 of the Civil Code of this State.¹

¹ Upon an examination of the evidence, the learned judge decided that Blythe had done all things required by § 230 to legitimate his daughter. PATERSON and SHARPSTEIN, JJ., concurred. McFARLAND and DE HAVEN, JJ., held that the acts required for legitimation under § 230 had not taken place, but concurred in the result on the ground that plaintiff was heir under § 1387. BEATTY, C. J., and HARRISON, J., did not sit. — ED.

CHAPTER VII.

RIGHTS OF PROPERTY.

SECTION I.IMMOVABLES.

CLARK v. GRAHAM.

SUPREME COURT OF THE UNITED STATES. 1821.

[Reported 6 Wheaton, 577.]

TODD, J. This is an action of ejectment brought in the Circuit Court for the District of Ohio. At the trial, the plaintiff proved a title sufficient in law, *prima facie*, to maintain the action. The controversy turned altogether upon the title set up by the defendants. That title was as follows: A letter of attorney, purporting to be executed by John Graham, bearing date the 23d of September, 1805, authorizing Nathaniel Massie to sell all his estate, etc., in all his lands in Ohio. This power was executed in the presence of two witnesses in Richmond, in Virginia, and was there acknowledged by Graham before a notary public.

Nathaniel Massie, by a deed dated the 7th day of June, 1810, and executed by him in Ohio, in his own right, as well as attorney to John Graham, conveyed to one Jacob Smith, under whom the defendants claimed the land in controversy. This deed was executed in presence of one witness only, and was duly acknowledged and recorded in the proper county in Ohio. The deed and letter of attorney so executed and acknowledged, were offered in evidence by the defendants, and were rejected by the court, upon the ground that they were not sufficient to convey lands according to the laws of Ohio. The defendants also offered in evidence a deed from Jacob Smith and wife, to the said Graham, dated the 7th of March, 1811, duly witnessed, acknowledged, and recorded, conveying a certain tract of land in Ohio, and offered further to prove, that the tract of land so conveyed was given in exchange for and in consideration of the lands conveyed by the deed first mentioned to Smith. This evidence, also, was rejected by the court. A bill of exceptions was taken to these proceedings by the defendants; and the jury found a verdict for the plaintiff, upon which a judgment

was entered for the plaintiff, and the present writ of error is brought by the defendants to revise that judgment.

The principal question before this court is, whether the deed so executed by Massie was sufficient to convey lands by the laws of Ohio. If not, it was properly rejected; if otherwise, the judgment should be reversed. Two objections have been taken to the execution of this deed; first, that the power of attorney was not duly acknowledged, as every deed is required to be in Ohio in order to convey lands; and if so, then the subsequent conveyance is void, for it is a general principle, that a power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands. On this objection, which is apparently well founded, it is unnecessary to dwell, as another objection is fatal; that is, the deed of Massie was executed in the presence of *one* witness only, whereas the law of Ohio requires all deeds for land to be executed in the presence of *two* witnesses. It is perfectly clear, that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situate. The act of Ohio regulating the conveyance of lands, passed on the 14th of February, 1805, provides, "that all deeds for the conveyance of lands, tenements, and hereditaments, situate, lying, and being within this State, shall be signed and sealed by the grantor in the presence of *two* witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within this State, shall be acknowledged by the party or parties, or proven by the subscribing witnesses, before a judge of the Court of Common Pleas, or a justice of the peace in any county in this State." Although there are no negative words in this clause, declaring all deeds for the conveyance of lands executed in any other manner to be void; yet this must be necessarily inferred from the clause in the absence of all words indicating a different legislative intent, and in point of fact such is understood to be the uniform construction of the act in the courts of Ohio. The deed, then, in this case, not being executed according to the laws of the State, the evidence was properly rejected by the Circuit Court.

The remaining point, as to the rejection of the evidence of the deed from Smith to Graham, and the proof to show that it was given in exchange for the land in controversy, has not been much relied on in this court. It is, indeed, too plain for argument, that if a deed imperfectly executed would not convey any estate or interest in the land, a parol exchange, or parol proof of an intention to convey the same in exchange, cannot be permitted to have any such effect.

Judgment affirmed, with costs.

SECTION II.

MOVABLES.

CAMMELL v. SEWELL.

EXCHEQUER CHAMBER. 1860.

[Reported 5 *Hurlstone & Norman*, 728]

TROVER for deals, with a count for money had and received. At the trial a verdict was taken for the plaintiffs, subject to a special case, which was substantially as follows. The plaintiffs were underwriters at Hull; the defendants merchants in London. The action was brought to recover part of a cargo of deals shipped on board the Prussian ship "Augusta Bertha" at Onega, in Russia, by the Onega Wood Company, for Messrs. Simpson & Whaplate, of Hull, and by them insured with the plaintiffs. The plaintiffs had paid Messrs. Simpson & Whaplate as for a total loss.

The "Augusta Bertha" having put into Harøe Roads, in Norway, in consequence of the shifting of her deck cargo, drove from her anchorage on the rocks at Smaage, about three miles from Molde. The cargo was discharged and the vessel abandoned, and the master sold the cargo by auction (against the protest of the representative of the consignees) to one Hans Clausen, who consigned them to the defendants. The cargo was sold by the defendants for an amount greater than the insurance money paid by the plaintiffs.

By the law of Norway, the sale by auction passed a good title to the purchaser, even if the master, as between himself and the owners, was acting wrongfully. The representative of the consignees instituted a suit in the Superior Diocesan Court of Trondjhem to set aside the sale; but the court confirmed the sale.

The Court of Exchequer ordered the verdict for the plaintiffs to be

set aside, and a verdict entered for the defendant; and the plaintiffs brought the case into the Exchequer Chamber on a writ of error.¹

CROMPTON, J. In this case the majority of the court (COCKBURN, C. J., WIGHTMAN, WILLIAMS, CROMPTON, and KEATING, JJ.) are of opinion that the judgment of the Court of Exchequer should be affirmed. At the same time we are by no means prepared to agree with the Court of Exchequer in thinking the judgment of the Diocesan Court in Norway conclusive as a judgment *in rem*, nor are we satisfied that the defendants in the present action were estopped by the judgment of that court, or what was relied on as a judicial proceeding at the auction. It is not, however, necessary for us to express any decided opinion on these questions, as we think that the case should be determined on the real merits as to the passing of the property.

If we are to recognize the Norwegian law, and if according to that law the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that the subsequent bringing the property to England can alter the position of the parties. The difficulty which we have felt in the case principally arises from the mode in which the evidence is laid before us in the mass of papers and depositions contained in the appendix.

We do not see evidence in the case sufficient to enable us to treat the transaction as fraudulent on the part of Clausen, although there are circumstances which would have made it better for him not to have become the purchaser. Treating him, therefore, as an innocent purchaser, it appears to us that the questions are, did the property by the law of Norway vest in him as an innocent purchaser? and are we to recognize that law? The question of what is the foreign law is one of fact, and here again there is great difficulty in finding out from the mass of documents what is the exact state of the law. The conclusion which we draw from the evidence is, that by the law of Norway the captain, under circumstances such as existed in this case, could not, as between himself and his owners, or the owners of the cargo, justify the sale, but that he remained liable and responsible to them for a sale not justified under the circumstances; whilst, on the other hand, an innocent purchaser would have a good title to the property bought by him from the agent of the owners.

It does not appear to us that there is anything so barbarous or monstrous in this state of the law as that we can say that it should not be recognized by us. Our own law as to market overt is analogous; and though it is said that much mischief would be done by upholding sales of this nature, not justified by the necessities of the case, it may well

¹ This short statement of facts is substituted for that of the Reporters in 3 H. & N. 617. Arguments of counsel are omitted. In the course of the argument, COCKBURN, C. J., said: "If a person sends goods to a foreign country it may well be that he is bound by the law of that country; but here the goods were wrecked on the coast of Norway, and came there without the owner's assent. Could the arrival of the goods there enlarge the captain's authority?" — Ed.

be that the mischief would be greater if the vendee were only to have a title in cases where the master was strictly justified in selling as between himself and the owners. If that were so, purchasers, who seldom can know the facts of the case, would not be inclined to give the value, and on proper and lawful sales by the master the property would be in great danger of being sacrificed.

There appears nothing barbarous in saying that the agent of the owners, who is the person to sell, if the circumstances justify the sale, and who must, in point of fact, be the party to exercise his judgment as to whether there should be a sale or not, should have the power of giving a good title to the innocent purchaser, and that the latter should not be bound to look to the title of the seller. It appears in the present case that the one purchaser bought the whole cargo; but suppose the farmers and persons in the neighborhood at such a sale buy several portions of the goods, it would seem extremely inconvenient if they were liable to actions at the suit of the owners, on the ground that there was no necessity for the sale. Could such a purchaser coming to England be sued in our courts for a conversion, and can it alter the case if he resell, and the property comes to this country?

Many cases were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Amongst others our law as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by a sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them, it would again be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the Lord Chief Baron in the course of the argument in the court below, where he says "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." And we do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that the goods which were wrecked here would on that account be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owner did not foresee that they would come to England.

Very little authority on the direct question before us has been brought to our notice. The only case which seems at variance with the principles we have enunciated is the case of the "Eliza Cornish" or "Segredo," before the judge of the Court of Admiralty. 1 Eccl. & Adm. 36. If this case be an authority for the proposition that a law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with the decision; and, with all the respect

due to so high an authority in mercantile transactions, we do not feel ourselves bound by it when sitting in a court of error. We must remark, also, that in the case of *Freeman v. The East India Company*, 5 B. & Ald. 617, the Court of Queen's Bench appear to have assented to the proposition that the Dutch law, as to market overt, might have had the effect of passing the property in such case if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law.

In the present case, which is not like the case of *Freeman v. The East India Company*, the case of an English subject purchasing in an English colony property which he was taken to know that the vendor had no authority to sell, we do not think that we can assume on the evidence that the purchase was made with the knowledge that the sellers had no authority, or under such circumstances as to bring the case within any exception to the foreign law, which seems to treat the master as having sufficient authority to sell, so as to protect the innocent purchaser where there is no representative of the real owner. It should be remarked, also, that Lord Stowell, in the passage, cited in the case of *Freeman v. The East India Company*, from his judgment in the case of the "*Gratitudine*," states that if the master acts unwisely in his decision as to selling, still the foreign purchaser will be safe under his acts. The doctrine of Lord Stowell agrees much more with the principles on which our judgment proceeds than with those reported to have been approved of in the case of the "*Eliza Cornish*," as, on the evidence before us, we cannot treat Clausen otherwise than as an innocent purchaser, and, as the law of Norway appears to us, on the evidence, to give a title to an innocent purchaser, we think that the property vested in him, and in the defendants as sub-purchasers from him, and that, having once so vested, it did not become divested by its being subsequently brought to this country, and, therefore, that the judgment of the Court of Exchequer should be affirmed.

COCKBURN, C. J. Concurring in the judgment delivered by my brother CROMPTON, it further appears to me that the case may also be put upon another and a shorter ground.

Although the goods in question were at one time the property of English owners, the property in them was transferred to others by a sale valid according to the law of Norway, a country in which the goods were at the time of such sale.

Even if it were admitted, for the purpose of argument, that by the law of the country to which the ship belonged the master would not have had the power to dispose of the ship or cargo in case of wreck, which the law of Norway gives in such a case; and that the law of Norway would be overridden by the law of the nation to which the ship belonged, then it is to be observed that, the ship having been a Prussian ship, and the carriers, the shipowners, Prussians, and the goods having been shipped in Russia, the power of the master must depend on the law either of the country to which the ship belonged, or

of the place where the contract to carry was entered into. The law of England, never having attached to the goods, as they never were on board an English vessel or reached British territory, cannot apply to the case. The law of nations cannot determine the question, for the international law is by no means uniform as to the powers of a master, as abundantly appeared from the various codes which were brought to our notice during the argument. But no evidence was adduced to show what was the law of Prussia or that of Russia in the matter in question.

The case therefore stands nakedly thus, — a good contract of sale to transfer the property in Norway, without anything to show that by the general law of nations, or by the law of any nation which can possibly apply to the present case, the sale valid in Norway can be invalidated elsewhere.

BYLES, J., dissented.

*Judgment affirmed.*¹

LANGWORTHY v. LITTLE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1858.

[Reported 12 Cushing, 109.]

THIS was an action of tort for a horse and buggy wagon, attached by the defendant, a deputy-sheriff, as the property of one Charles E. McCarty, September 11, 1849. The plaintiff, an inhabitant of Hillsdale, in the State of New York, claimed title under a prior mortgage from said McCarty, made and dated at said Hillsdale, September 1, 1849, at which time the property was at Hillsdale, and in the possession of said McCarty. The mortgage was duly filed in the town-clerk's office of Hillsdale, according to the laws of New York, which were produced and read at the trial in the Court of Common Pleas. Rev. Sts. of New York, vol. 2, p. 71. The plaintiff also proved a due demand on the defendant for the payment of the amount due him on said mortgage, pursuant to Rev. Sts. c. 90, § 79, and that payment was refused. The defendant offered to prove that said McCarty, the mortgagor, at

¹ The general rule that the passing of title to a chattel is determined by the law of the situs, not by that of the place of making the contract of transfer, nor by that of the domicile of the owner, is well established. *Mackey v. Pettyjohn*, 6 Kan. App. 57, 49 Pac. 636; *Ames v. McCamber*, 124 Mass. 85. (See, however, *N. W. Bank v. Poynter* [1895], A. C. 56; *Fouke v. Fleming*, 13 Md. 392.) Thus the requirements as to registration depend upon the law of the situs. *Coote v. Jecks*, L. R. 13 Eq. 597; *Goaline v. Dunbar*, 32 N. B. 325. If the title has passed by the law of the situs, the new title is recognized in any State into which the goods may be brought; and this although by the law of the latter State the title would not have passed. This rule obtains whether the title passed by consent of the parties, *Rabun v. Rabun*, 15 La. Ann. 471; *Sleeper v. Pa. R. R.*, 100 Pa. 259; or by operation of law, as, for instance, by the statute of limitations. *Shelby v. Guy*, 11 Wheat. 361; *Brown v. Brown*, 5 Ala. 508; *Waters v. Barton*, 1 Cold. 450. — Ed.

the time of making the mortgage, resided in the town of Mount Washington, in this county, and after the mortgage was made, immediately returned with it to this State, and the same remained here in his possession, until it was attached by the defendant, on a writ in favor of citizens of Connecticut, who had no knowledge of the mortgage; nor was the same recorded in the town of Mount Washington. *Mellen, J.*, ruled that these facts constituted no defence to the action, and the verdict being for the plaintiff, the defendant excepted to such ruling. The other facts of the case are stated in the opinion.¹

SHAW, C. J. This mortgage of personal property was made in New York, the property then being there, to a citizen of New York, there residing, recorded in the town-clerk's office in the town of Hillsdale, New York, and so made as to be valid, and bind the property in that State. Being removed into Massachusetts, it was here attached by the defendant, as the property of the mortgagor. The property in question was a horse and buggy wagon, and it appeared that the horse and wagon were sold by the plaintiff at Hillsdale, to McCarty, the mortgagor, and mortgaged back at the same time, to secure McCarty's note given at the same time, in part payment for said purchase. The plaintiff, by this conveyance, acquired a good qualified title to the property, by the laws of the State of New York, a property sufficient to enable him to maintain trover against a wrongdoer; and an officer attaching the property as the property of the mortgagor, especially without paying, and in fact refusing to pay the debt of the mortgagee, when notified to him and demanded of him, is as to him a wrongdoer. A party who obtains a good title to property, absolute or qualified, by the laws of a sister State, is entitled to maintain and enforce those rights in this State. It is a case where the *lex loci contractus* must govern.

We think there is no ground for the argument, that by the St. 1843, c. 72, this mortgage should have been recorded by the clerk of the town where the mortgagor resides, and also of the town where he principally transacts his business, or follows his calling, and that said statute obviously applies only to mortgages made in Massachusetts.

*Exceptions overruled.*²

¹ Arguments of counsel are omitted. — Ed.

² *Acc.* U. S. Bank v. Lee, 13 Pet. 107; *Alferitz v. Ingalls*, 83 Fed. 964; *Beall v. Williamson*, 14 Ala. 55; *Hall v. Pillow*, 31 Ark. 32; *Ballard v. Winter*, 39 Conn. 179; *Peterson v. Kaigler*, 78 Ga. 464, 3 S. E. 655; *Mumford v. Canty*, 50 Ill. 370; *Smith v. McLean*, 24 Ia. 322; *Handley v. Harris*, 48 Kan. 606, 29 Pac. 1145; *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 364; *Barker v. Stacy*, 25 Miss. 471; *Smith v. Hutchings*, 30 Mo. 380; *Offutt v. Flagg*, 10 N. H. 46; *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. 721; *Wilson v. Rustad*, 7 N. D. 330, 75 N. W. 260; *Kanaga v. Taylor*, 7 Ohio S. 134; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353; *Cranshaw v. Anthony, Mart. & Y.* 102; *Craig v. Williams*, 90 Va. 500, 185 E. 899; *McGregor v. Kerr*, 29 N. S. 45.

Contra, *Wilson v. Carson*, 12 Md. 54; *Corbett v. Littlefield*, 84 Mich. 30 (see *Vining v. Millar*, 109 Mich. 205, 67 N. W. 126); *Armitage v. Spahn*, 4 Pa. Dist. Ct. 270. And see *Jones v. Taylor*, 30 Vt. 42.

MARVIN SAFE COMPANY v. NORTON.

SUPREME COURT OF NEW JERSEY. 1886.

[Reported 48 New Jersey Law, 410.]

ON May 1, 1884, one Samuel N. Schwartz, of Hightstown, Mercer county, New Jersey, went to Philadelphia, Pennsylvania, and there, in the office of the prosecutors, executed the following instrument:—

“ May 1st, 1884.

“ *Marvin Safe Company* :

“ Please send, as per mark given below, one second-hand safe, for which the undersigned agrees to pay the sum of eighty-four dollars (\$84), seven dollars cash, and balance seven dollars per month. Terms cash, delivered on board at Philadelphia or New York, unless otherwise stated in writing. It is agreed that Marvin Safe Company shall not relinquish its title to said safe, but shall remain the sole owners thereof until above sum is fully paid in money. In event of failure to pay any of said instalments or notes, when same shall become due, then all of said instalments or notes remaining unpaid shall immediately become due. The Marvin Safe Company may, at their option, remove said safe without legal process. It is expressly understood that there are no conditions whatever not stated in this memorandum, and the undersigned agrees to accept and pay for safe in accordance therewith.

SAMUEL N. SCHWARTZ.

“ Mark — Samuel N. Schwartz, Hightstown, New Jersey.

“ Route — New Jersey.

“ Not accountable for damages after shipment.”

Schwartz paid the first instalment of \$7 May 1, 1884, and the safe was shipped to him the same day. He afterwards paid two instalments, of \$7 each, by remittance to Philadelphia by check. Nothing more was paid.

On July 30, 1884, Schwartz sold and delivered the safe to Norton for \$55. Norton paid him the purchase-money. He bought and paid for the safe without notice of Schwartz's agreement with the prosecutors. Norton took possession of the safe and removed it to his office. Schwartz is insolvent and has absconded.

The prosecutor brought trover against Norton, and in the court below the defendant recovered judgment, on the ground that the defendant, having bought and paid for the safe *bona fide*, the title to the safe, by the law of Pennsylvania, was transferred to him.

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DEPUE, J. The contract expressed in the written order of May 1, 1884, signed by Schwartz, is for the sale of the property to him conditionally, the vendor reserving the title, notwithstanding delivery, until the contract price should be paid. The courts of Pennsylvania make a distinction between the bailment of a chattel, with power in the bailee to become the owner on payment of the price agreed upon, and the sale of a chattel with a stipulation that the title shall not pass to the purchaser until the contract price shall be paid. On this distinction the courts of that State hold that a bailment of chattels, with an option in the bailee to become the owner on payment of the price agreed upon, is valid, and that the right of the bailor to resume possession on non-payment of the contract price is secure against creditors of the bailee and *bona fide* purchasers from him; but that upon the delivery of personal property to a purchaser under a contract of sale, the reservation of title in the vendor until the contract price is paid is void as against creditors of the purchaser or a *bona fide* purchaser from him. *Clow v. Woods*, 5 S. & R. 275; *Enlow v. Klein*, 79 Penn. St. 488; *Haak v. Linderman*, 64 Penn. St. 499; *Stadfeld v. Huntsman*, 92 Penn. St. 53; *Brunswick v. Hoover*, 95 Penn. St. 508; 1 Benj. on Sales (Corbin's ed.), § 446; 30 Am. Law Reg. 224, note to *Lewis v. McCabe*.

In the most recent case in the Supreme Court of Pennsylvania Mr. Justice Sterrett said: "A present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that in default of such payment the vendor may recover possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon. As between the parties to such contracts, both are valid and binding; but as to creditors, the latter is good while the former is invalid." *Forest v. Nelson*, 19 Rep. 38; 108 Penn. St. 481.

The cases cited show that the Pennsylvania courts hold the same doctrine with respect to *bona fide* purchasers as to creditors.

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In this State, and in nearly all of our sister States, conditional sales — that is, sales of personal property on credit, with delivery of possession to the purchaser and a stipulation that the title shall remain in the vendor until the contract price is paid — have been held valid, not only against the immediate purchaser, but also against his creditors and *bona fide* purchasers from him, unless the vendor has conferred upon his vendee *indicia* of title beyond mere possession, or has forfeited his right in the property by conduct which the law regards as fraudulent. The cases are cited in *Cole v. Berry*, 13 Vroom, 308; *Midland R. R. Co. v. Hitchcock*, 10 Stew. Eq. 549, 559; 1 Benj. on Sales (Corbin's ed.), §§ 437-460; 1 Smith's Lead. Cas. (8th ed.) 33-90; 30 Am. Law Reg. 224, note to *Lewis v. McCabe*; 15 Am. Law Rev. 380, tit. "Conversion by Purchase." The doctrine of the courts of Pennsylvania is

founded upon the doctrine of *Twyne's Case*, 3 Rep. 80, and *Edwards v. Harbin*, 2 T. R. 587, that the possession of chattels under a contract of sale without title is an indelible badge of fraud — a doctrine repudiated quite generally by the courts of this country, and especially in this State. *Runyon v. Groshon*, 1 Beas. 86; *Broadway Bank v. McElrath*, 2 Beas. 24; *Miller ads. Pancoast*, 5 Dutch. 250. The doctrine of the Pennsylvania courts is disapproved by the American editors of *Smith's Leading Cases* in the note to *Twyne's Case*, 1 Sm. Lead Cas. (8th ed.) 33, 34, and by Mr. Landreth in his note to *Lewis v. McCabe*, 30 Am. Law Reg. 224; but nevertheless the Supreme Court of that State, in the latest case on the subject — *Forest v. Nelson*, decided February 16, 1885 — has adhered to the doctrine. It must therefore be regarded as the law of Pennsylvania that upon a sale of personal property with delivery of possession to the purchaser, an agreement that title should not pass until the contract price should be paid is valid as between the original parties, but that creditors of the purchaser, or a purchaser from him *bona fide*, by a levy under execution or a *bona fide* purchase, will acquire a better title than the original purchaser had — a title superior to that reserved by his vendor. So far as the law of Pennsylvania is applicable to the transaction it must determine the rights of these parties.

The contract of sale between the Marvin Safe Company and Schwartz was made at the company's office in Philadelphia. The contract contemplated performance by the delivery of the safe in Philadelphia to the carrier for transportation to Hightstown. When the terms of sale are agreed upon, and the vendor has done everything that he has to do with the goods, the contract of sale becomes absolute. *Leonard v. Davis*, 1 Black, 476; 1 Benj. on Sales, § 308. Delivery of the safe to the carrier in pursuance of the contract was delivery to Schwartz, and was the execution of the contract of sale. His title, such as it was, under the terms of the contract was thereupon complete.

The validity, construction, and legal effect of a contract may depend either upon the law of the place where it is made or of the place where it is to be performed, or, if it relate to movable property, upon the law of the situs of the property, according to circumstances; but when the place where the contract is made is also the place of performance and of the situs of the property, the law of that place enters into and becomes part of the contract, and determines the rights of the parties to it. *Fredericks v. Frazier*, 4 Zab. 162; *Dacosta v. Davis*, 4 Zab. 319; *Bulkley v. Honold*, 19 How. 890; *Scudder v. Union National Bank*, 91 U. S. 406; *Pritchard v. Norton*, 106 U. S. 124; *Morgan v. N. O., M. & T. R. R. Co.*, 2 Woods, 244; *Simpson v. Fogo*, 9 Jur. (N. S.) 403; *Whart. Conf. of Law*, §§ 341, 345, 401, 403, 418; *Parr v. Brady*, 8 Vroom, 201. The contract between Schwartz and the company having been made, and also executed in Pennsylvania by the delivery of the safe to him, as between him and the company Schwartz's title will be determined by the law of Pennsylvania. By the law of that State

the condition expressed in the contract of sale that the safe company should not relinquish title until the contract price was paid, and that by the failure to pay any of the instalments of the price the company might resume possession of the property, was valid as between Schwartz and the company. By his contract Schwartz obtained possession of the safe and a right to acquire title on payment of the contract price; but until that condition was performed the title was in the company. In this situation of affairs the safe was brought into this State, and the property became subject to our laws.

The contract of Norton, the defendant, with Schwartz for the purchase of the safe was made at Hightstown in this State. The property was then in this State, and the contract of purchase was executed by delivery of possession in this State. The contract of purchase, the domicile of the parties to it, and the situs of the subject-matter of purchase were all within this State. In every respect the transaction between Norton and Schwartz was a New Jersey transaction. Under these circumstances, by principles of law which are indisputable, the construction and legal effect of the contract of purchase, and the rights of the purchaser under it, are determined by the law of this State. By the law of this State Norton, by his purchase, acquired only the title of his vendor, — only such title as the vendor had when the property was brought into this State and became subject to our laws.

It is insisted that inasmuch as Norton's purchase, if made in Pennsylvania, would have given him a title superior to that of the safe company, that therefore his purchase here should have that effect, on the theory that the law of Pennsylvania, which subjected the title of the safe company to the rights of a *bona fide* purchaser from Schwartz, was part of the contract between the company and Schwartz. There is no provision in the contract between the safe company and Schwartz that he should have power, under any circumstances, to sell and make title to a purchaser. Schwartz's disposition of the property was not in conformity with his contract, but in violation of it. His contract, as construed by the laws of Pennsylvania, gave him no title which he could lawfully convey. To maintain title against the safe company Norton must build up in himself a better title than Schwartz had. He can accomplish that result only by virtue of the law of the jurisdiction in which he acquired his rights.

The doctrine of the Pennsylvania courts that a reservation of title in the vendor upon a conditional sale is void as against creditors and *bona fide* purchasers, is not a rule affixing a certain construction and legal effect to a contract made in that State. The legal effect of such a contract is conceded to be to leave property in the vendor. The law acts upon the fact of possession by the purchaser under such an arrangement, and makes it an indelible badge of fraud and a forfeiture of the vendor's reserved title as in favor of creditors and *bona fide* purchasers. The doctrine is founded upon considerations of public policy adopted in that State, and applies to the fact of possession and acts of owner-

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ship under such a contract, without regard to the place where the contract was made, or its legal effect considered as a contract. In *McCabe v. Blymyr*, 9 Phila. Rep. 615, the controversy was with respect to the rights of a mortgagee under a chattel mortgage. The mortgage had been made and recorded in Maryland, where the chattel was when the mortgage was given, and by the law of Maryland was valid though the mortgagor retained possession. The chattel was afterwards brought into Pennsylvania, and the Pennsylvania court held that the mortgage, though valid in the State where it was made, would not be enforced by the courts of Pennsylvania as against a creditor or purchaser who had acquired rights in the property after it had been brought to that State; that the mortgagee, by allowing the mortgagor to retain possession of the property and bring it into Pennsylvania, and exercise notorious acts of ownership, lost his right under the mortgage as against an intervening Pennsylvania creditor or purchaser, on the ground that the contract was in contravention of the law and policy of that State. Under substantially the same state of facts this court sustained the title of a mortgagee under a mortgage made in another State, as against a *bona fide* purchaser who had bought the property of the mortgagor in this State, for the reason that the possession of the chattel by the mortgagor was not in contravention of the public policy of this State. *Parr v. Brady*, 8 Vroom, 201.

The public policy which has given rise to the doctrine of the Pennsylvania courts is local, and the law which gives effect to it is also local, and has no extraterritorial effect. In the case in hand the safe was removed to this State by Schwartz as soon as he became the purchaser. His possession under the contract has been exclusively in this State. That possession violated no public policy,—not the public policy of Pennsylvania, for the possession was not in that State; nor the public policy of this State, for in this State possession under a conditional sale is regarded as lawful, and does not invalidate the vendor's title unless impeached for actual fraud. If the right of a purchaser, under a purchase in this State, to avoid the reserved title in the original vendor on such grounds be conceded, the same right must be extended to creditors buying under a judgment and execution in this State; for, by the law of Pennsylvania, creditors and *bona fide* purchasers are put upon the same footing. Neither on principle nor on considerations of convenience or public policy can such a right be conceded. Under such a condition of the law confusion and uncertainty in the title to property would be introduced, and the transmission of the title to movable property, the situs of which is in this State, would depend, not upon our laws, but upon the laws and public policy of sister States or foreign countries. A purchaser of chattels in this State, which his vendor had obtained in New York or in most of our sister States under a contract of conditional sale, would take no title; if obtained under a conditional sale in Pennsylvania, his title would be good; and the same uncertainty would exist in the title of purchasers of property so circumstanced at a sale under judgment and execution.

The title was in the safe company when the property in dispute was removed from the State of Pennsylvania. Whatever might impair that title — the continued possession and exercise of acts of ownership over it by Schwartz and the purchase by Norton — occurred in this State. The legal effect and consequences of those acts must be adjudged by the law of this State. By the law of this State it was not illegal nor contrary to public policy for the company to leave Schwartz in possession as ostensible owner, and no forfeiture of the company's title could result therefrom. By the law of this State Norton, by his purchase, acquired only such title as Schwartz had under his contract with the company. Nothing has occurred which, by our law, will give him a better title.

The judgment should be reversed.

MASURY v. ARKANSAS NATIONAL BANK.

CIRCUIT COURT OF THE UNITED STATES, E. DISTRICT ARKANSAS. 1898.

[Reported 87 Federal Reporter, 381.]

THIS is a bill in equity by Grace Masury against the Arkansas National Bank and others to cancel a sheriff's sale of shares in a corporation, and to declare and foreclose a lien on the stock. The cause was heard on demurrer to the bill.

WILLIAMS, District Judge. The only questions involved are whether, under the statutes of Arkansas, a seizure of shares of the capital stock of a corporation existing under the laws of that State, by virtue of a writ of attachment, or under execution, takes precedence over a prior transfer or pledge, not transferred on the books of the corporation, nor filed for record in the office of the county clerk of the county in which the corporation transacts its business, and whether the laws of this State govern such a transfer, if made in another State. As to the last proposition, learned counsel for complainant claim that *Black v. Zacharie*, 3 How. 483, is conclusive that the laws of New York, where the transfer was made, and not the laws of Arkansas, of which State the company was a corporation, control. The question involved in that suit was not that of a transfer of shares, but an assignment of the equity of redemption in stock previously assigned and delivered as a pledge. The court say:

"We admit that the validity of this assignment to pass the right to Black in the stock attached depends upon the laws of Louisiana [the domicile of the corporation], and not upon that of South Carolina [where the assignment was made]. From the nature of the stock of a corporation, which is created by and under the authority of a State, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that State, and not by the local law of any foreign State."

Judge Lowell, speaking of the same subject, says:

“Whatever the general principles of international law in relation to assignments of personal claims may be, the validity of a transfer of stock is governed by the law of the place where the corporation is created.” Lowell, Stocks, § 50; Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727; Green v. Van Buskirk, 7 Wall. 140.

I am therefore of the opinion that, unless the transfer of this stock is valid under the laws of Arkansas, the State which created the corporation, the laws of the State where the transfer was actually made cannot control.



*George Courtney
Covers This*

SECTION III.

TRUSTS.

EX PARTE POLLARD. IN RE COURTNEY.

CHANCERY. 1840.

[*Reported Montague & Chitty's Reports, 239.*]

LORD COTTENHAM, L. C.¹ The short result of the facts of this case, as stated in the special case by which I am bound, is, that the bankrupts were absolutely entitled, as part of their partnership property, to some land in Scotland, the legal title being in George Courtney, one of the bankrupts; that the firm, being indebted to the petitioner, George Pollard, in order to induce him to give them further credit, deposited with him the disposition and instrument of seisin, being the title deeds of such lands, and signed and gave to him a memorandum in writing, dated the 13th of March, 1832, declaring that they thereby gave to Pollard a lien upon the land for the general balance of all or any monies that then were or might thereafter become due to him from them to the extent of £2,000, and they agreed that he should stand in the nature of an equitable mortgagee thereof; and, on demand, they further agreed to make, do, and perfect all such acts for the better securing to him of any such monies as aforesaid; that Pollard, relying upon the security of the hereditaments so charged to him as aforesaid, continued to give credit to the bankrupts to the time of their bankruptcy, which took place on the 20th December, 1832, at which time he was a creditor for the sum of £1,927 4s. 6d. The only other facts stated in the special case, material to the present question, is, that by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit of the title deeds, or by the written memorandum. The question is, whether Pollard is, under the circumstances, entitled to have his debt paid out of that part of the estate of the bankrupts which consists of their property in Scotland, in preference to their general creditors; or, in other words, the assignees being liable to all the equities to which the bankrupt was subject, whether such a deposit and agreement, made and entered into in this country, gave to the creditor such a title as against his debtor to have the agreement performed and the debt paid out of the property in Scotland, the subject of such deposit and agreement. The special case also finds that the deposit and agreement does not by the law of Scotland create any lien or equitable mortgage upon the estate. By this statement of the law of Scotland, which, sitting here, I must consider

¹ The opinion only is given. — Ed.

as a fact; I am bound, but so far only as the statement goes, and that does not find anything contrary to the well-known rule, that obligations to convey, perfected *secundum legem domicilii*, are binding in Scotland, but that by the law of Scotland no lien or equitable mortgage was created by the deposit and agreement; by which must be understood that the law of Scotland does not permit such deposit and agreement to operate *in rem*, and not that they may not give a title to relief *in personam*. It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to operate *in rem*; but in contracts respecting lands in countries not within the jurisdiction of these courts they can only be enforced by proceedings *in personam*, which courts of equity here are constantly in the habit of doing: not thereby in any respect interfering with the *lex loci rei sitæ*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

The observations of Lord Hardwicke in *Penn v. Baltimore*, 1 Ves. 454, are founded upon this distinction. In *Lord Cranstown v. Johnston*, 3 Ves. 182, Lord Alvanley, upon principles of equity familiar in this country, set aside a sale in the Island of St. Christopher, by the laws of which country the sale was perfectly good, no such principles of equity being recognized by the courts there, saying, "With regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situated in England." In *Scott v. Nesbitt*, 14 Ves. 442, Lord Eldon, in the face of the master's report finding that there was no law or usage in Jamaica for a lien by a consignee in respect of supplies furnished to the estate, directed consignees to be allowed such expenditure in their account with encumbrancers. Bills for specific performance of contracts for the sale of lands, or respecting mortgages of estates, in the colonies and elsewhere out of the jurisdiction of this court, are of familiar occurrence. Why then, consistently with these principles and these authorities, should the fact, that by the law of Scotland no lien or equitable mortgage was created by the deposit and memorandum in this case, prevent the courts of this country from giving such effect to the transactions between the parties as it would have given if the land had been in England? If the contract had been to sell the lands a specific performance would have been decreed; and why is all relief to be

refused because the contract is to sell, subject to a condition for redemption? The substance of the agreement is to charge the debt upon the estates, and to do and perfect all such acts as may be necessary for the purpose; and if the court would decree specific performance of this contract, and the completion of the security according to the forms of law in Scotland, it will give effect to this equity by paying out of the proceeds of the estate (which being part of the bankrupt's estate must be sold) what is found to be the amount of the debt so agreed to be charged upon it, which is what the creditor asks. The special case finds, that the deeds were deposited and the agreement signed by the bankrupts in order to induce the creditor to give them further credit, and that he, relying upon the security of the hereditaments so charged to him, continued to give credit to the bankrupts to the time of their bankruptcy. The transaction is in no respect impeached, and there is no competition with any person having obtained a title under the law of Scotland. The only parties resisting the creditor's claim are the assignees, who are bound by all the equities which affected the bankrupts. To deny to the creditor the benefit of this security would be an injustice which, if unavoidable, would be much to be regretted. In giving effect to it I act upon the well-known rules of equity in this country, and do not violate or interfere with any law or rule of property in Scotland, as I only order that to be done which the parties may by that law lawfully perform.

I reverse the judgment of the Court of Review, giving to the creditor payment of his debt out of the proceeds of the estate.

Judgment of the Court of Review reversed.

ACKER v. PRIEST.

SUPREME COURT OF IOWA. 1894.

[Reported 92 Iowa, 610.]

DEEMER, J.¹ The plaintiffs in the equity suit are the heirs at law of Elizabeth Priest, deceased, and the defendant, Stephen C. Priest, is their father. Mrs. Priest was a daughter of one Joseph Abrams. Joseph Abrams had one son and three daughters, besides Mrs. Priest. In the month of July, 1884, Abrams, who was then living in the State of Kansas, concluded to make a partial distribution and advancement of his property to his children. He was then the owner of two farms in Kansas, one of which was known as his "Home Farm," and the other was occupied by defendant Priest and his family. Thomas W. King, another son-in-law, owned and occupied another and a third farm in the same county as the other two. In order to carry out his purpose, and make an equal distribution of property to his daughters, Abrams

¹ Part of the opinion only is given. — Ed.

made arrangements with King to exchange the home farm, valued at \$8,000, for the King place, at the agreed price of \$4,000. Prior thereto, however, Abrams had had a conversation with defendant Priest, in which he told him he intended to give him a farm. After making arrangements with King, Abrams informed defendant that he had an opportunity to trade the home farm for King's land, and directed defendant to go and look at the farm, and if it suited him he (Abrams) would make the exchange. Defendant, after examining the place, was pleased with it, and so informed Abrams, and Abrams made the contemplated exchange. Abrams deeded the home farm to King, and King, by direction of Abrams, and with the knowledge, direction, and consent of the deceased, Mrs. Priest, made a deed to his place to the defendant Priest. This last deed was a warranty deed, in the usual form, and for the expressed consideration of \$4,000. Shortly after the making of these deeds, the defendant moved onto the King farm, and used and occupied it for a year or more, when he sold it, and with the proceeds purchased a farm in Cass County, Iowa, from one Isabella Goodale. The deed to the Cass County land was taken in the name of the defendant with the knowledge and consent of his wife. Defendant and his wife immediately took possession of the Cass County land, and occupied and used the same until the death of his wife, in April, 1888. After the death of the wife, and in May, 1891, the defendant sold the land in Cass County, and at the time of the commencement of this suit was in possession of a large part of the proceeds of the sale. Plaintiffs claim that the defendant at all times had the title to the Kansas land and to the land in Cass County in trust for his wife, Elizabeth V. Priest, and that they, as her heirs at law, are entitled to have a trust impressed upon the funds now in the hands of the defendant, arising out of the sale of the Cass County land. Defendant Isaac Dickerson was made a party to the suit because of his having possession of some of the funds arising from the sale of the land in this State. . . .

Plaintiffs do not — nor, indeed, could they, under the statutes of either Kansas or of this State — claim an express trust in the land, or the proceeds thereof. Their claim is that from the transactions between the parties, as proved, there arose an implied, a resulting, or a constructive trust, which the law will recognize and enforce. We turn then to the evidence, and find that while it was the intention of Abrams to make a partial distribution of his estate among his heirs, yet it did not appear to him to be important to whom he made the deeds, — whether to his daughters, in their own names, or to their husbands. The deed to the home farm was made to King, the husband of one of his daughters, and the deed to the King farm was made direct to defendant Priest. Abrams had previously spoken to defendant about giving him a farm, and while the deed was, no doubt, made so as to place all his children on an equality, it is quite evident to us that it was wholly immaterial to him to whom the deed should be made. Before having the deed made to defendant, Abrams spoke to his daughter, Mrs.

Priest, about how the deed should be made, and "she said to make it to her husband; it was all the same." Again, Abrams testifies, "My daughter gave no reason [for making the deed to her husband], except that it would be all right, recognizing him as her husband." Even if Abrams intended the deed to be for the benefit of Mrs. Priest and her children, as he says, he did not so state to defendant, and defendant had no knowledge but that he was to take the beneficial as well as the legal estate. Abrams directed King to make the deed to defendant, and King had no conversation whatever with defendant.

Applying these facts to the statutes of Kansas, before quoted, with reference to the creation of trusts,¹ and it is clear that defendant took an absolute title to the land deeded him by King, unincumbered with any trust. It is contended, however, that the laws of Kansas have no application to this case, that the statutes above quoted relate simply to the remedy, and that the *lex fori* governs. Without deciding this question, so far as it relates to the statute of frauds, for it is not necessary to a determination of the case, and passing it with the single remark that where the statute relates simply to the remedy, and does not make the parol contract void, as is the case with the statute in question, there is much force in appellants' position, we are clearly of the opinion, however, that the other statutes with reference to the creation of trust estates are binding, for they go to the validity and operation of the contract, and of the alleged trust in the land. It is familiar doctrine that the law of the place where the contract is made is to govern as to its nature, validity, obligation, and interpretation, and the law of the forum as to the remedy. *Bank v. Donnelly*, 8 Pet. 316; *Scudder v. Bank*, 91 U. S. 406; *Burchard v. Dunbar*, 82 Ill. 450. It is also everywhere acknowledged that the title and disposition of real property are exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. *Kerr v. Moon*, 9 Wheat. 565; *McCormick v. Sullivan*, 10 Wheat. 196. And a title or right in or to real estate can be acquired, enforced, or lost only according to the law of the place where such property is situated. *Bentley v. Whittemore*, 18 N. J. Eq. 373; *Hosford v. Nichols*, 1 Paige, 220; *Williams v. Maus*, 6 Watts, 278; *Wills v. Cowper*, 2 Ohio, 124.

If we are correct in our premises, it necessarily follows, as a conclusion, that under the laws of Kansas there was no trust created by law in the Kansas land, even if it be said that Mrs. Priest furnished the consideration paid for the land, because there was no agreement on the part of the defendant that he should hold the title in trust for his wife.²

¹ Gen. St. Kan. 1868, c. 114, § 6. When a conveyance for a valuable consideration is made to one person, and the consideration thereof paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject to the provisions of the next two sections. — Ed.

² The court further held that apart from the statutes of Kansas there was no trust. *Acc. Depas v. Mayo*, 11 Mo. 314; *Penfield v. Tower*, 1 N. D. 216. — Ed.

NORTON v. FLORENCE LAND AND PUBLIC WORKS
COMPANY.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1877.

[*Reported 7 Ch. D. 332.*]

THIS was a motion on behalf of the holders of obligations issued by the Florence Land and Public Works Company to restrain the Anglo-Italian Bank from selling the company's property at Florence, of which they were mortgagees.

The company, whose property consisted partly of land and houses at Florence, was registered under the Companies Act, 1862, with an office in London. By the articles of association it was empowered to issue "debenture bonds" and "mortgage bonds."

In 1868 the company, under the powers of the articles, issued obligations in the following form:—

"The Florence Land and Public Works Company, Limited, in consideration of the sum of £100 advanced and lent to them by , do hereby, in pursuance and under the power of their articles of association, bind themselves, their successors, assigns, and all their estate, property, and effects, to pay to the said , or bearer, on presentation of this bond at the registered office of this company in England, the said principal sum of £100 on the 24th day of June, 1875, and also interest on the said principal sum of £100 until paid, at the rate of £6 per cent per annum, at the times and places mentioned in the coupons attached hereto: Provided also, and it is hereby declared, that this bond is issued subject to the condition and scale indorsed hereon."

In March, 1871, the Anglo-Italian Bank, which had an office in London, entered into an agreement with the company to open a credit in the company's favor for £50,000, the amount, together with future advances, to be secured by a mortgage upon the property of the company in and near Florence. This was accordingly executed in the Italian form on the 30th of March, 1871, and registered at Florence, to secure £50,000, and a further sum of £5000.

On the 14th of August, 1877, the company was served in Florence with a citation to appear before the Civil and Correctional Tribunal of Florence, at an audience to be held on the 29th of August, 1877, to hear accorded executive force in the kingdom of Italy to the said mortgage, and to hear authority given to the proper officer for the execution thereof. This citation was issued at the instance of the bank in order to enforce their security, and judgment was obtained thereon giving validity to the deed, and enforcing payment. The bank were about to take steps for the sale of the property.

The plaintiff, a holder of the said obligations, thereupon brought his action, claiming a declaration that the plaintiff and the other debenture holders were mortgagees of the company's property at Florence in priority to the bank.

The plaintiff alleged that the bank had notice of the charge on the property created by the obligations. No evidence was adduced as to the rights of the parties according to the law of Italy.¹

JESSEL, M. R. I am of opinion that the motion fails, and I think it ought to fail on every ground suggested. In the first instance, I assume that the instrument created a charge on property; it would then be a charge on all the property and effects of the company. It appears that the company had houses and land in Florence, which, of course, is out of my jurisdiction, and would be subject to the law of Florence and to Italian law. It also appears that the defendants, the bank, advanced money to the company, and took a mortgage which was registered according to the law of Florence, and as they insist, takes priority over every unregistered charge. That may or may not be so, the Italian law not being proved before me by the plaintiff, and it is for him to show that he has a charge according to the Italian law.

Now he has not proved it, because he has not proved the Italian law; therefore I must for the present purpose assume, as against him, that there is a want of registration, or that otherwise he has no charge. But then he says, 'Not having a charge according to the Italian law on the houses in Florence, I am still entitled to take them away from those who are entitled to them according to the Italian law, for this reason: I have a contract by the former owner of the houses to convey them to me—I am putting it as strongly as possible in his favor—and the present defendants have obtained a conveyance of the house which was more valid, according to the Italian law, with notice of my prior contract, and I am entitled to enforce that contract not only against the contracting party, but against every person who had notice of that contract.'

The answer is very simple. It depends on the law of the country where the immovable property is situated. If the contract according to the law of that country binds the immovable property, as it does in this country, when for value, that may be so, but if it does not bind the immovable property, then it is not so. You cannot by reason of notice to a third person of a contract which does not bind the property thereby bind the property if the law of the country in which the immovable property is situate does not so bind it. That would be an answer to the claim so far as regards the notion that mere notice would do.

But there is another answer to the plaintiff's motion. It seems that these houses being in Florence the bank has taken precedence in the Court of Florence, the proper court having jurisdiction, to establish their title; and the litigation there to which the plaintiffs are or may be parties being in the court of the country having actual jurisdiction over the subject-matter, and having entertained that jurisdiction by a prior litigation, it is contrary to all the rules of the comity of nations that this court should actively interfere between the same litigants. That also appears to me to be an answer to this application.

¹ The statement of facts has been slightly condensed.—Ed.

But there is a third, and, in my opinion¹, a fatal answer, which is, that if the law of England does apply, still, as I read this document, the plaintiff has no charge on the houses in Florence. That is, supposing it were property in London instead of in Florence, I should hold that the plaintiff had no charge on it whatever.¹

The motion must be refused with costs.²

IN RE FITZGERALD.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1903.

COURT OF APPEAL. 1904.

[Reported 1903, 1 Ch. 933, 1904, 1 Ch. 573.]

By an indenture of settlement dated September 20, 1862, and made between William Robert Seymour Vesey Fitzgerald of the first part, the defendant Sir William Gerald Seymour Vesey Fitzgerald (hereinafter called Sir Gerald Fitzgerald) of the second part, Jane Margaret Matilda Macdonald Lockhart of the third part, and trustees of the fourth part (being a settlement made upon the marriage of Sir Gerald Fitzgerald and Miss Lockhart), W. R. S. V. Fitzgerald covenanted that his heirs, executors, and administrators would, within six months of his death, pay to the trustees the sum of 6000*l.*, to be held by them upon trust for investment as therein mentioned, and to pay the income of the trust fund to Sir Gerald Fitzgerald and his assigns during his life, and after his death to Lady Fitzgerald and her assigns during her life, and after the death of the survivor to stand possessed of the trust fund in trust for the issue of the intended marriage as therein declared. This settlement was in English form, but was executed in Scotland, where the marriage took place. On the same date a marriage contract in Scotch form was executed by Sir Gerald and his then intended wife, whereby, after reciting the English settlement, she assigned and conveyed to the same trustees all and sundry the lands and heritages, goods, gear, debts, and sums of money, and generally her whole property (with certain small exceptions), to the uses and purposes therein-after mentioned, namely, first, for payment of the expenses of executing the trust; secondly, for payment of the free annual proceeds of the trust estate to the said J. M. M. Lockhart during all the days of her life, and that on her own receipt alone, exclusive of the *jus mariti* and right of administration of the said Sir Gerald Fitzgerald; thirdly, in case the said Sir Gerald Fitzgerald should be the survivor of the spouses, for payment of the whole free annual proceeds of the estate to him during all the days of his life after the death of the said J. M. M. Lockhart, declaring that all payments to the said Sir Gerald Fitzgerald should be strictly "alimentary," and should "not be assign-

¹ The remainder of the opinion, in which this point was discussed, is omitted.—Ed.

² See *Mercantile I. & G. T. Co. v. River Plate T. L. & A. Co.*, (1892) 2 Ch. 303.—Ed.

able, nor liable to arrestment, or any other legal diligence at the instance of the creditors."

Shortly after the execution of these instruments the marriage took place. There was only one child of the marriage, the defendant Geraldine Tryphœna Margaret Seymour Vesey Fitzgerald, who was born on June 19, 1863.

Between the years 1863 and 1901 numerous deeds were executed in England by Sir Gerald and Lady Fitzgerald, in some of which Miss Fitzgerald joined, creating incumbrances upon their respective interests under the English and Scotch settlements. Subsequently to 1901 Sir Gerald further incumbered his life interest under the settlements. The defendant, Colonel Frederick Henry Harford was the first mortgagee of Sir Gerald's life interest under the Scotch settlement.

Lady Fitzgerald died on May 16, 1901.

This was a summons taken out on October 12, 1901, by the trustees, who were all domiciled in England, asking (inter alia) that it might be determined whether Sir Gerald Fitzgerald was entitled for his life to the income of the trust funds comprised in the Scotch contract of marriage free from incumbrance and without power of alienation, or who was now entitled to the said income.

The trust funds originally comprised in the Scotch contract consisted partly of two bonds of the respective values of 6000*l.* and 7200*l.*, secured upon heritable or immovable property in Scotland. The whole of the 6000*l.* and a portion of the 7200*l.* still remained so invested. By the law of Scotland heritable bonds of this character are real property, except for certain purposes specified in the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 117.

It appeared from an affidavit made by the Lord Advocate of Scotland that by the law of Scotland a person might create a life interest in favor of another, and by declaring it to be "alimentary" might exclude (so far as the life interest did not exceed in amount a reasonable provision) the diligence of ordinary creditors, and restrain all power of anticipation.

It further appeared that by the law of Scotland, if in the case of such an alimentary provision as was in question in the present case, the husband failed to maintain the children of the marriage, they would be entitled to attach the alimentary provision made for him by the contract.

The principal question arising on the summons was whether the Scotch contract must be construed according to the law of Scotland or that of England.

Joyce, J. (after stating the facts as to the marriage, and referring to the terms of the Scotch contract). Under the provisions of this document, which I may call the Scotch settlement, the trustees have from time to time become entitled to receive and had vested in them various funds comprising (inter alia) Scotch mortgages or heritable bonds and sums of Consols and India stock, but not any Scotch real or im-

movable estate other than mortgages or heritable securities, if they be, as alleged, real estate and to be treated as immovable property.

Lady Fitzgerald, the wife, died in 1901. Sir Gerald having previously, as he has also since that date, and in some cases with the concurrence of his wife, executed in England various assignments of or charges upon his interest under the Scotch settlement, the question has arisen whether the income or alimentary provision to which Sir Gerald Fitzgerald has become entitled under the Scotch settlement is now payable by the trustees to Sir Gerald or to his assigns and incumbrancers. It is contended on behalf of Sir Gerald and the only child of the marriage that, according to the law of Scotland, which it is said governs the case, the effect of the declaration in the Scotch settlement that all payments to Sir Gerald shall be alimentary and not assignable or liable to arrestment, precluded Sir Gerald from assigning or creating any valid incumbrance upon the income to which he would otherwise be now entitled under the trusts of the Scotch settlement.

The domicile of Sir Gerald has remained English all along. His residence is in England. The trustees are all subject to the jurisdiction of the English Court. Indeed, it is they who have invoked its aid in order to determine the question that has been raised. In the existing circumstances, even if the construction and legal effect of this Scotch settlement are to be determined by the law of Scotland — *In re Barnard*, 56 L. T. 9 — it appears to me that its validity and operation with respect to the matter now in question must be determined by the laws of England: *Westlake on International Law*, p. 76; *Vaizey on Settlements*, p. 1640, *et seq.*

Further, if the question were to be considered as one purely of contract between the parties to the Scotch settlement, a contract inconsistent with the law and policy of this country, or, in other words, which conflicts with what are deemed in England to be essential public interests, could not be enforced here: *Westlake on International Law*, 3rd ed. s. 215.

But according to the law of England an inalienable trust cannot be created in favor of a man even for his maintenance. A mere prohibition of alienation cannot be effectually imposed except in the case of a married woman's separate property: *Brandon v. Robinson*, 18 Ves. 429; 11 R. R. 226; *Graves v. Dolphin*, 1 Sim. 66; 27 R. R. 166; *Youngehusband v. Gisborne* (1844), 1 Coll. 400. It is contrary to the policy of the law in this country that property should be so settled as to continue in the enjoyment of a bankrupt notwithstanding bankruptcy. In other words, the declaration in the Scotch settlement that all payments to Sir Gerald shall not be assignable or liable to arrestment at the instance of creditors is void and inoperative according to English law, being repugnant and contrary to public policy.

It can hardly be doubted that, so far as relates to the pure personality or movable property comprised in the Scotch settlement, the law of England must govern the case. And upon consideration, having regard to

the frame of the settlement, I think there is no difference with respect to such part, if any, of the funds or securities comprised in the settlement as ought, according to the law of Scotland, to be treated and considered as real or immovable property. What Sir Gerald has is a personal claim against the trustees for payment of the residue of the income derived from the several investments for the time being subject to the Scotch settlement, after payment thereof of all the expenses of executing the trusts. I think that the decision of the House of Lords in *Scott v. Allnutt*, 2 Dow & Cl. 404, cited in Story on the Conflict of Laws, applies. See also per Lord Nottingham in *Noell v. Robinson* (1681), 2 Vent. 358. It is unnecessary, therefore, to consider whether, even if this were not so, the income as soon as it came to the hands of Sir Gerald would not be bound in equity by the assignments he has made, so as to render him liable to be restrained by injunction from disposing of such income otherwise than by payment to his assignees. It is also, I think, unnecessary to consider whether, if it could be shown that as to any part of the property comprised in the Scotch settlement (*e.g.*, the portion consisting, or that did consist, of heritable bonds or Scotch mortgages) the law applicable was *prima facie* that of Scotland, such law ought not to be enforced in the courts of this country, upon the ground that it would result in injustice to English creditors or incumbrancers.

Upon the whole, I am of opinion that in the circumstances of the present case Sir Gerald Fitzgerald is not entitled to require payment to himself of the income of the trust funds as being free from incumbrances or without power of anticipation, but that his assignees or incumbrancers are the persons entitled to receive payment from the trustees of the Scotch settlement.

Sir Gerald appealed.

COZENS-HARDY, L.J. The first question for consideration on this appeal is whether what I may shortly describe as the Scotch settlement is subject to the law of Scotland, or whether it must be governed by English law. Now this Scotch settlement dealt with the property of a domiciled Scotch lady, who was about to marry a domiciled Englishman, and there is no doubt but the "matrimonial domicile" was English. It is not suggested that a permanent residence in Scotland after the marriage was contemplated. As a general rule the law of the matrimonial domicile is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express stipulation that some other law shall apply. See *Van Grutten v. Digby* (1862), 31 Beav. 561, in which case the matrimonial domicile was French, but the contract, though made in France and void by French law, was nevertheless treated by Sir John Romilly as valid so far as it related to property within the jurisdiction. See also *Viditz v. O'Hagan* (1899), 2 Ch. 569. The decision in that case was reversed by the Court of Appeal, but not on the ground in any way

affecting this point. It is not necessary that there should be an express stipulation. It is sufficient if the court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicile.

Applying these principles to the Scotch settlement, I find several important indications. (a) The great bulk of the property, namely, 13,200*l.*, was invested in heritable bonds. It has been settled by a chain of authorities, which ought not now to be reviewed by us, namely, by Grant M.R., in *Johnstone v. Baker*, 4 Madd. 474, n., by Leach M.R. in *Jerningham v. Herbert*, 4 Russ. 388; 28 R. R. 136, and by Wigram V.-C. in *Allen v. Anderson* (1846), 5 Hare, 163, that heritable bonds must be regarded in our courts as immovables. If so, it can scarcely be denied that the *lex loci* — *i. e.*, the law of Scotland — must apply to the extent of the 13,200*l.* I am aware that there has been a change of investment of part of this sum into English securities, but this change cannot alter the law applicable to the settlement. I may add that, as to the 13,200*l.*, the matter does not rest in contract. There is an actual completed assignment of the heritable bonds. (b) There was, however, 500*l.* cash belonging to the lady, which was paid over to the trustees for investment, and which was, in fact, invested in Consols, although it might have been invested in heritable securities in Scotland. It seems to me that this sum cannot fairly be treated as intended to be subject to a different law from that which is applicable to the bulk of the property. (c) The whole frame of the settlement is in Scotch form, and the limitations are of such a nature that they can only take effect if Scotch law is to be applied. I therefore feel bound to treat this as a settlement made in Scotland by a domiciled Scotch lady of Scotch property, in Scotch form, and subject to Scotch law. The trustees of this Scotch settlement must in Scotland follow the Scotch law, and their residence in England, or their English domicile, is irrelevant. This being so, it follows, in my opinion, that we are bound to hold that Sir Gerald Fitzgerald takes such interest, and such interest only, as the courts in Scotland would declare him entitled to: *Ansthruther v. Adair*, 2 My. & K. 513; 39 R.R. 263. There ought to be no difference in a matter of this kind between the Court of Sessions and the High Court. The nature and extent of his interest cannot depend upon his domicile, although his capacity to deal with his interest may perhaps depend upon his domicile. To take the somewhat analogous case of a life interest in English property given by the will of a domiciled Englishman for the separate use of a married woman, without power of anticipation, it has never, so far as I am aware, been suggested that the nature and extent of her interest varied according as her domicile was, or was not, English. The trust would be regarded in our courts as valid and operative, even though by the law of her domicile neither the separate use nor the restraint upon anticipation was recognized. And, on general principles, the same view ought to be adopted by the courts of the country in which the married woman was domiciled. In short, by

the law of England, it is the Scotch law which must be applied to this Scotch settlement.

It is, however, strongly urged that a strictly alimentary provision for an adult male is not only unknown to and inconsistent with the provisions of English law, as in general it undoubtedly is, but that it is contrary to public policy, and ought therefore to be wholly disregarded in an English court. I cannot adopt this argument. There is nothing immoral in such a provision. Indeed, there are many instances in which pensions or retiring allowances are by statute made not transferable, or liable to be attached by any legal process. I may refer to the pension allowed to a retiring clergyman under the Incumbents' Resignation Act, 1871, and to the observations of the Court of Appeal on that statute in *Gathercole v. Smith* (1881), 17 Ch. D. 1. Moreover, it has been long settled that at common law, and apart from any statutory enactments prohibiting assignment, certain salaries or pensions are inalienable. For example, the half-pay of an officer. In *Flarty v. Odum* (1790), 3 P. R. 681, 682; 1 R. R. 791, Lord Kenyon said: "I am clearly of opinion that this half-pay could not be legally assigned by the defendant. . . . Emoluments of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. . . . It might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned." In the following year the same question came up for consideration in *Lidderdale v. Duke of Montrose* (1791), 4 T. R. 248, 250; 2 R. R. 375. This was an action by an officer on half-pay against the Paymasters-General of the army to recover arrears of his half-pay, and the only question was whether an assignment by way of mortgage, of which the defendants had due notice, justified them in withholding the money from the plaintiff. The Court was clearly of opinion that, "on principles of public policy, as well as on account of the interest of the officers themselves, by law such assignments were void." The mortgagee was not party to this action, but it seems to have been thought that he might obtain equitable relief, and he accordingly filed a bill in the Exchequer: see *Stone v. Lidderdale* (1795), 2 Anstr. 533; 3 R. R. 622. It was argued that the assignment was good in equity, as a transfer of any valuable contingency or possibility, if made for good consideration, is affirmed in equity. But MACDONALD, C.B., in a considered judgment, declined to accept this view, and held that the plaintiff was not entitled to any relief in equity in respect of the mortgage. In short, he declined to affect the conscience of the mortgagor in respect of future instalments of the half-pay.

In my opinion it is impossible to disregard this "alimentary provision" on the ground of public policy. The Scotch court would de-

clare that the interest given to Sir Gerald cannot be assigned, and would disregard the claims of his specific mortgagees, and it is our duty to follow and adopt the Scotch law: *Anstruther v. Adair*, 2 My. & K. 513; 39 R. R. 263.

But then it was urged that Sir Gerald could bind, and did bind, the income, as and when it reaches the hands of the trustees in England, and that, whatever might be the rights of his alimentary creditors, he himself ought not to be allowed to claim from the trustees the income which he has, by a contract binding on his conscience, charged in favor of his mortgagees. I doubt whether this doctrine, which is explained and illustrated by Lord Macnaghten in *Tailby v. Official Receiver* (1888), 13 App. Cas. 523, 543, has any application to a vested life interest, the assignment of which takes effect, if at all, for reasons wholly independent of conscience. An assignment of a vested equitable interest is complete and operative, though voluntary. It in no way depends upon contract, or upon anything further to be done by the assignor. The doctrine applies only where there is no present property capable of assignment, such as possibilities and expectancies. *Stone v. Lidderdale* 2 Anstr. 533; 3 R. R. 622, is an authority against the respondent's contention, and I know of no authority in its favor. I may observe that the defendant Lidderdale was a domiciled Englishman, whose general capacity to contract was undoubted. Moreover, this contention is really only another way of presenting the argument that we ought to disregard the Scotch law. If the life interest is capable of assignment, the Court would grant specific performance of the contract, and would aid the mortgagees by granting an injunction. If, however, as in *Stone v. Lidderdale*, the interest is non-assignable, I think it follows that no effect can be given to a deed purporting to assign by way of anticipation. The decision of the House of Lords in *Scott v. Allnutt*, 2 Dow & C. 404, which was relied upon, does not really touch the case.

In my opinion, the order of JORCE, J., was wrong, in so far as it declared that the whole of the income during the life of Sir Gerald is payable to his assignees or incumbrancers, according to their respective priorities. If the amount of the income were very large, any excess beyond a reasonable amount would, according to the Scotch law, pass to the assignees or incumbrancers, but I do not understand that it is suggested that there is any excess in the present case. I think the declaration should be to the effect that Sir Gerald is entitled to the whole income during his life, free from the claim of any assignees or incumbrancers, but without prejudice to the rights (if any) of his alimentary creditors, or of Miss Fitzgerald, and without prejudice to any prior payment in respect of the policy, which is the subject of another appeal by Miss Fitzgerald.¹

¹ VAUGHAN WILLIAMS, L. J., delivered a concurring opinion; STIRLING, L. J., dissented.

PURDOM v. PAVEY.

SUPREME COURT OF CANADA. 1896.

[Reported 26 Canada, 412.]

THIS action was brought by Pavey & Co., creditors of one Ebenezer Davidson. The said Davidson had made a general assignment for the benefit of his creditors; the assets were insufficient to pay the debts, and a balance was due these plaintiffs. Afterwards Davidson became entitled to land in Oregon; he conveyed this land to his father, who gave to Purdom a mortgage on the land equal to the amount of the purchase-money named in the deed. The plaintiffs alleged that Purdom took said mortgage as a trustee for Davidson, in pursuance of a fraudulent scheme to defraud plaintiffs and other creditors of Davidson; and prayed that Purdom should be declared a trustee for Davidson, and that the money due on the mortgage note should be ordered paid into court for the benefit of the plaintiffs. The defendants demurred. From a judgment of the Court of Appeal of the Province of Ontario, overruling the demurrer, the defendants appealed to this court.¹

STRONG, C. J. So far as the lands are concerned, the validity or invalidity of this transaction must depend on the *lex rei sitæ*, — the law of the State of Oregon, — and there is no allegation that according to that law a constructive trust by operation of law would arise by reason of the intent to hinder and delay creditors, or that even an express trust must necessarily enure to the benefit of or be available for the satisfaction of creditors. . . .

Then whether the allegation of a "trust" of the purchase-money secured by the mortgage which the plaintiffs allege is to be considered as an averment of a trust arising by operation of law consequent upon the illegality of the transaction or as an allegation of a conventional express trust, in either case the question would depend on the *lex rei sitæ*, and from this alone it follows that the forum of the situs is the proper forum.

In this last aspect of the case, *Re Hawthorne*, *Graham v. Massey*, 23 Ch. Div. 748, and *Norris v. Chambres*, 29 Beav. 246, appear to me to be authorities.

Appeal allowed with costs.

SECTION IV. — MARITAL PROPERTY.

DE NICOLS v. CURLIER.

HOUSE OF LORDS. 1899.

[Reported [1900] Appeal Cases, 21.]

EARL OF HALSBURY, L. C. My Lords, it is not necessary to state with great minuteness how the question in the present appeal arises. It is enough to say that two French subjects were married according to the laws of France on May 30, 1854. No marriage contract or instrument in writing was executed by either of the parties. The parties lived together, and in the year 1863 they came to England, and in the

¹ This short statement is substituted for that of the Reporter. Part of the opinion only is given. — Ed.

year 1865 the husband obtained the status of a naturalized British subject.

The whole dispute turns on the question whether the changed domicile and naturalization of the husband affected the wife's rights so as to give the husband the power to dispose of all the movable property by will instead of being restricted to the power of disposing of only one-half of it, as he undoubtedly would have been so restricted by the French law if the French law is decisive of the question.¹

If this is the law by which the matter is to be governed, it cannot be denied that the appellant here must succeed, and it is a little difficult to understand upon what principle contracts and obligations already existing *inter se* should be affected by an act of one of the contracting parties over which the other party to the contract has no control whatever. And indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, in that case the change of domicile could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife; when if the law creates that contract relation, then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction.

A written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the married status. I not only do not understand, but I should decline to assent to any such view, unless I am compelled by authoritative decision or statute to adopt a view which to my mind is so entirely unreasonable. And it does not appear to me that any court before whom this question has come would disagree with me as to its being unreasonable.

The Master of the Rolls himself says: "It is not altogether satisfactory to hold that a change of domicile cannot affect an express contract embodying the law of the matrimonial domicile, but that a change of domicile does affect the application of that law if not embodied in an express contract."

My Lords, I should think that, in order to be binding on your Lordships, a previous decision must be in principle, and, as applicable to the same circumstances, identical; and it appears to me that the case by which the Master of the Rolls thought himself bound (*Lashley v. Hog*, 4 Paton, 581) is quite distinguishable both in principle and in circumstances.

To omit other questions, the cardinal distinction between the French and the Scottish law is not, I think, without an important bearing upon

¹ The Lord Chancellor here stated the French law. — ED.

the very question in debate, and I think it may be stated shortly thus: If the wife by the marriage in Scotland acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his; and herein, I think, is to be found the key to Lord Eldon's judgment. He says (4 Paton, 617): "The true point seems to be this, whether there is anything irrational in saying that as the husband, during the whole of his life, has the absolute disposition over the property, that as to him, whom the policy of the law has given the direction of the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions and property which is his own, and which is to remain his own, or to become that of his family according to his will — why should it be thought an unreasonable thing, that, where there is no express contract, the implied contract shall be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy in case the husband thinks proper to die intestate?"

It will be observed that the whole point of what Lord Eldon argues is that the whole of the property, apart from express contract, is absolutely and entirely the husband's, and that as by law he can dispose of it as he will, it is not unreasonable that he should be at liberty to do something which by its legal effect will change what I think are inaccurately described as the rights of the wife, but are accurately described as what would have been the rights of the wife if no change had taken place, because in substance she has until the husband's death no rights at all.

Doubtless it is true that, according to the authorities on Scottish law, the right of the wife is no right at all in its strict sense. When speaking of the *jus mariti* it is described as a legal assignation to the husband, and in commenting on this authority, the late Mr. Fraser, while at the Scottish Bar, in his book on the Law of Husband and Wife, 2d ed. vol. i. p. 677, says: "At a very early period of our law, the distinction between the two rights was recognized. The right of administration was regarded as being nothing more than its name imports — a right of administering the property of the spouses; while the *jus mariti* was something separate and superior, its purpose being to transfer the property from one spouse to the other. The distinction is settled and taken in a number of cases ranging from an early period to the present time, and has not been so clearly marked in some institutional works, solely from the desire of the writers to reconcile it with the notion of an absolute veritable *communio*." . . . "The distinction is thus stated in argument in the Session Papers of Gowan v. Pursell:

The *jus mariti* over the movables is a right during the existence of the marriage of absolute property. The husband may sell, or squander, or wastefully destroy the movables that fall under communion." How different the position of the wife is under the French law is sufficiently indicated, in contrast to the above extract, by section 1443 of Code Civil, which enacts that: "1443. A separation of property can only be judicially sued for by the wife whose dowry is in danger, and when the disorder of the husband's affairs is such that there is reason to fear that his property will not be sufficient to satisfy the wife's rights and claims. Any voluntary separation is void." And if the propositions are put shortly — that the wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right — the distinction between the two systems is evident enough. The *communio bonorum* in Scotland is a mere fiction. In France it is a reality, and in England, as the Master of the Rolls says, the parties to the litigation now being discussed, Mr. and Mrs. Hog, were both English, married in England, where her unsettled property, existing and after acquired, became the property of Mr. Hog by the mere fact of the marriage, and gave Mrs. Hog no proprietary right whatever to the movable property in question.

Once it is admitted that the marriage gives a proprietary right (and therein is the importance of the distinction Lord Eldon took between what was inaccurately argued in that case as a proprietary right conferred by the fact of marriage and a real proprietary right conferred by specific contract), the anomaly pointed out by the Master of the Rolls and sought to be explained becomes at once intelligible. It is only material as illustrating what was the prevailing train of thought in the minds of Lord Eldon and Lord Rosalyn. Both of them speak of the words "implied contract," by which I presume they mean implied from the relation of husband and wife, and not unnaturally they deduce the conclusion that if it is implied from that relation only the husband's change of domicile may bring with it the consequential change from such relation.

Here, however, as I have endeavored to point out, the French marriage confers not only an implied but an actual binding partnership proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify.

I can only account for the absolutely inaccurate use of the Scottish term *jus relictæ* as arising from a reference to a dispute that appears to have existed in the Scottish authors as to whether those rights flowed from the communion, whereas, to quote again from Mr. Fraser's book, p. 671, where he says: "It has been found in accordance with the opinions of the French commentators, of Dirleton, and other lawyers of our own country, that the *jus relictæ* and *legitim* are in all respects the same; that they are mere casual contingent rights during the subsistence of the marriage, existing then only in hope, and coming

into proper rights merely at its dissolution; that they are not rights of division of a fund already held in common, but rights of debt against the husband's executors, constituting the widow and the children creditors, whose right comes into being by the husband's death, and secondary creditors too, for all other debts must be paid before theirs."

It is, therefore, as I understand, that when once Lord Eldon came to the conclusion that the husband and wife had become Scottish domiciled spouses, the property not affected by a previous complete and irrevocable right would properly be distributed according to Scottish law.

It follows, therefore, if I am right, that that case is not binding on your Lordships, and that we are at liberty to decide the question now in debate, in accordance with reason and common sense.

I therefore move your Lordships that the order appealed from be reversed, and that in respect of costs, as I understand this is only one question in the summons which comprehends other questions also in debate, the costs of this appeal should be costs in the summons.

LORD MACNAGHTEN. My Lords, in 1854 Mr. De Nicols, the testator, and the appellant, who is now his widow, intermarried in Paris. They were both French by birth and both domiciled at the time in France. They married without a contract of marriage, and consequently under the law of France they became subject to the system of community of goods.

In 1863 Mr. and Mrs. De Nicols left Paris and came to London. They acquired an English domicile, and in 1865 Mr. De Nicols obtained a certificate of naturalization in this country. From that time forward their residence in England was continuous. Mr. De Nicols became a restaurant proprietor in London. He was successful in business, and amassed a large fortune, consisting of both movable and immovable property.

Mr. De Nicols died in February, 1897, having made a will in the English form and language.

The question for your Lordships' consideration is whether Mr. and Mrs. De Nicols continued subject to the system of community of goods after they became domiciled in England. On the one hand it is contended that the change of domicile from French to English destroyed the community altogether, and, therefore, that the testator's will operated upon the whole of the property vested in him which, but for that change, would have been common. On the other hand it is said that the community continued notwithstanding the change of domicile, and that Mr. De Nicols remained bound by the article of the Code Civil, which provides that the testamentary donation by the husband cannot exceed his share of the community.

If the case were not embarrassed by the judgment of this House in *Lashley v. Hog*, which was discussed so fully at the bar, it would not, I think, present much difficulty.

Putting aside *Lashley v. Hog* for the moment, the only question would seem to be what was the effect according to French law of the

marriage of Mr. and Mrs. De Nicols without a marriage contract? Upon that point there cannot, I think, be any room for doubt. It is proved by the evidence of M. Lax, the expert in French law called on behalf of the appellant, that, according to the law of France, a husband and wife intermarrying without having entered into an antenuptial contract in writing are placed and stand by the sole fact of the marriage precisely in the same position in all respects as if previously to their marriage they had in due form executed a written contract, and thereby adopted as special and express covenants all and every one of the provisions contained in articles 1401 to 1496 in Title V. of the Code Civil, headed "Of Marriage Contracts and the respective rights of spouses."

In support of this conclusion, M. Lax refers to the relevant articles of the Code and to a decision of the highest authority pronounced by the Cour de Cassation in January, 1854. The case as reported by Siréy presents the argument so clearly and so concisely that I may be pardoned for referring to it more in detail. The summary in Siréy's Reports is as follows: (Tables Générales [Contrat de Mariage] paragraphe 8.) "The conjugal association as to property once formed at the time of the marriage by the operation of the law of the domicile or nationality of the husband cannot be altered later on either by a change of nationality or by the acquisition of a new personal domicile subsequently to the marriage." The case was this: An Englishman and an Englishwoman, a Mr. and Mrs. Boyer, were married in England without any settlement. Afterwards they went to France and jointly acquired immovable property there. The husband became a French citizen. The wife died first. On her death duty was demanded and paid on one-half of the property as having devolved upon her children as her next of kin. An action was brought for the return of the duty. The tribunal of Lille ordered repayment, holding that "the matrimonial compact in respect of property is as immutable as the marriage itself, of which it is an accessory." The revenue authorities appealed. The Cour de Cassation affirmed the decision. They founded their judgment upon their view of English law, which seems right enough, and upon the following considerations: that "the rule of the marriage of the spouses Boyer has followed them to France when they went there to settle and there acquired property," and that "the said rule has the same force as if a formal contract had been entered into between the said spouses for the regulation of their fortune."

Although this reasoning may not seem quite in accordance with the opinion which Lord Eldon expressed in *Lashley v. Hog*, as to the effect of an English marriage without a settlement, it indicates, I think, the view which, according to French law, would be taken of the compact as to property constituted by a French marriage under the Code Civil without an antenuptial agreement.

The expert who was called on behalf of the executors does not attempt to contravene this conclusion of law. He endeavors to minimize its effect by treating it as a self-evident proposition — as in fact

being nothing more than what the Code declares. He adds, however, that in his opinion the effect of a change of domicile or nationality upon the community system was never considered by the framers of the Code. That may be so. But if there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicile. Why should the obligations of the marriage law, under which the parties contracted matrimony, equivalent according to the law of the country where the marriage was celebrated to an express contract, lose their force and effect when the parties become domiciled in another country? As M. Lax points out, change of domicile and naturalization in a foreign country are not among the events specified in the Code as having the effect of dissolving or determining the community. Let us suppose a case the converse of the present one. Suppose an Englishman and an Englishwoman, having married in England without a settlement, go to France and become domiciled there. Suppose that at the time of the acquisition of the French domicile the husband has £10,000 of his own. Why should his ownership of that sum be impaired or qualified because he settles in France? There is nothing to be found in French law, nothing in the Code Civil, to effect this alteration in his rights. Community of goods in France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And the community must commence from the day of the marriage. It cannot commence from any other time. It appears to me, therefore, that the proposition for which the executors contend cannot be supported on principle. That, I think, was the view of the Court of Appeal. But they considered that the judgment of Lord Eldon in *Lashley v. Hog*, compelled them to decide in favor of the executors.¹

It appears to me that the case is not governed by the decision in *Lashley v. Hog*, and I think the appeal ought to be allowed.

LORD MORRIS, LORD SHAND, and LORD BRAMPTON concurred.

HARRAL v. HARRAL.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1884.

[*Reported 39 New Jersey Equity, 279.*]

FREDERICK F. HARRAL was born in Connecticut in 1842. He graduated at Yale College in 1863, and at the College of Physicians and

¹ The learned Lord here stated and commented upon the case of *Lashley v. Hog*. — Ed.

Surgeons in New York City, in 1868. He was married on the 20th of February, 1877, before the deputy mayor, in the city of Paris, to Clarice Marie Le Gars, a Frenchwoman. In May, 1878, he returned to this country, and died at Kirkbride's hospital for the insane, in Philadelphia, July 5, 1881.

On the 9th of July, 1869, and before his departure for Europe, the decedent duly made and executed a will, devising and bequeathing all his property, real and personal, to his brother and sisters, and appointing William Creighton Peet and Hamilton Wallis executors. This will was admitted to probate in the prerogative court of this State on the 31st of July, 1882.

The widow filed this bill in the Court of Chancery of this State, to which the legatees under the will of her husband and the executors are parties.

The prayer of the bill is that the personal estate of the decedent, so far as concerns the complainant's interest therein, should be distributed in accordance with the laws of France.

On final hearing, on bill answer and depositions, the chancellor made a decree in accordance with the prayer of the bill. From that decree the defendants appealed.

DEPUE, J. The law of France in relation to the rights of husband and wife in the property of either spouse is established by the Code Napoléon. Before the French Revolution, the northern provinces of France were under the customary law, and the community of property governed the nuptial contract; in the southern provinces the Roman law prevailed, and the contract was governed by the dotal system. The Code Napoléon left the parties to elect the law by which the marriage should be governed; and if no election was made, the community system was to prevail. 2 Kent, 187, note. Section 1391 of the Code provides that the parties may declare in a general manner that they intend to marry either under the law of community or under the law of dowry. The community is either legal or conventional. Legal community is established either by a simple declaration that the parties marry under the law of community, or by a marriage without any contract on the subject. Sections 1400, 1497. There was no marriage contract between these parties with respect to property; and if disposition of the personal estate in question is to be made by the French law, it must be disposed of as community property.

Community is divided by the Code into two classes — active and passive. The former relates to the disposition of property; the latter, to liability for debts. The property which is comprised in the community consists of (1) All the movable property which the married parties possessed on the day of the celebration of the marriage, and all movable property which falls to them during the marriage, by succession, or even by donation, if the donor has not expressed himself to the contrary; (2) All the fruits, revenues, interest, and arrears of what nature soever they may be, fallen due or received during the marriage,

and arising from property which belonged to the married persons at the time of the celebration of the marriage, or from such as has fallen to them during the marriage by any title whatsoever; and (3) All immovable property acquired during the marriage. Section 1401. This community, whether it be conventional or legal, commences from the day of the marriage contracted before the officer of the civil power. Section 1399. During the coverture the husband has the custody, control, management, and power of disposition (under some restrictions) of the community property (sections 1421, 1422); and he may make a testamentary disposition of his portion of the community property, but of no more. Section 1423. After the death of the husband the wife may accept or renounce the community. Section 1453. If she accept it, her share — that is, the one-half part of the community property — is given to her, subject, in the partition, to certain specified deductions and allowances by way of compensation. Sections 1467, 1480.

The complainant, in her bill, charges that the legal domicile of the decedent, at the time of his death, was in France, and insists that from the time of the celebration of her marriage with the testator, by force and operation of the laws of France, a legal community was established between her and her husband as to all the personal or movable property possessed or owned by either of them during the marriage, and in all the fruits, revenues, interest, and income thereof; and that upon the death of the testator she was entitled to have and receive, absolutely, for her own use and benefit, the one-half part of all such property so held in community between herself and her husband, and that it was not in the power of her husband to dispose of that share or interest in said property, which, by the laws of France, belonged to her.

The defendants, in their answer, admit that the testator was married to the complainant on the 20th of February, 1877, at Paris; but they say that the marriage was void for the reason that the testator at that time was of non-sane mind, and incompetent to enter into a contract of marriage. They admit that the testator lived in Paris for five years before his marriage, but deny that his legal domicile was, at the time of his marriage, or at any time, in France, and insist that distribution of his personal estate should be made under the laws of New Jersey. They also say that by the law of France no man can become domiciled in France without he shall have first applied to the French government for permission to do so, and obtained an express authorization from the government to establish such domicile, and that the testator never obtained an authorization to establish his domicile in France, and never became domiciled there by the laws of that country.

The chancellor, in his opinion, considered the evidence on the subject of the testator's mental condition at the time of his marriage, and reached the conclusion that the testator was not at that time mentally incapacitated to contract marriage or to change or establish his domi-

cil. The evidence shows that the decedent, for some time, had been addicted to intemperance, and that his physical and mental vigor had been impaired by indulgence in drink; but it falls short of proof that, at the time of his marriage, his mental faculties had become so impaired as to incapacitate him from entering into a contract of marriage, or from deciding upon the place of his domicile. The answer contains no allegation of fraud or imposition upon the decedent in procuring the marriage. The case turns wholly upon the applicability of the community law to the testator's personal estate in the hands of his executors.

When the testator went abroad in 1869, his property consisted of personal estate, and a house and lot in Bridgeport, Connecticut. The personal estate he left in charge of Mr. Wallis, to be invested and cared for, and it remained in charge of the latter during the lifetime of the decedent. This personal estate, amounting to about \$50,000, at the testator's death came to the hands of the executors. This controversy relates wholly to the personal estate.¹ . . .

The complainant's counsel contended that inasmuch as the marriage was celebrated in France, the wife, immediately on her consummation of the marriage, acquired a vested right in her husband's property, independent of any question of domicile, and that her right in the personal property of the husband was a *jus* acquired by the marriage by virtue of the French law, which could not be invalidated by any extraneous circumstances. This view has had some support in the opinions of writers on international law, but is contrary to the course of decision in the courts of this country, and, I may add, to the later decisions of the courts elsewhere. The doctrine generally adopted and supported by reason and public policy is, that a marriage celebrated according to rites and ceremonies recognized by the laws of the country where the marriage takes place, is valid everywhere; and, as a general rule (not without exceptions), by that law the capacity of the parties to contract a marriage is determined. Whart. on Conf. of Laws, §§ 161, 162, 164; Story on Conf. of Laws, §§ 113, 113 *a*, 114, 123 *b*, 124, 124 *a*; Bish. on Marr. and Div. §§ 357, 359, 363, 370; Moore v. Hegeman, 92 N. Y. 521. But with respect to the property rights of husband or wife in the personal property of either, derived from the marriage relation, the place where the marriage was celebrated is not decisive: these rights depend on what is known in law as the matrimonial domicile. Le Breton v. Nouchet, 3 Mart. (La.) 60, 81; Ford v. Ford, 2 Mart. (N. S.) 574; Allen v. Allen, 6 Rob. (La.) 104; Knceland v. Ensley, Meigs (Tenn.) 620; Glenn v. Glenn, 47 Ala. 204; Mason v. Homer, 105 Mass. 116; Story on Conf. of Laws, §§ 186, 193; 2 Pars. on Cont. 590. Mr. Wharton says that the place of the celebration is not necessarily the place of the performance of the marriage, which, he says, the later jurists have agreed is its true legal site, and that this place of performance is the matrimonial domicile to which the husband and wife propose

¹ Here follows a discussion on domicile, for which see *ante*, Vol. I. p. 195. — Ed.

to repair. Whart. on Confl. of Laws, § 192. On the marriage, the legal presumption is that the wife takes the domicile of her husband, and her rights are subject to the law of his domicile; but that presumption is overcome, and the legal inference is superseded when, on the marriage, the parties adopt a place for their matrimonial domicile—in which event the matrimonial domicile will control, and will regulate the property rights of the parties in movables.

The authorities are quite generally in accord in selecting the matrimonial domicile as the place which shall furnish the law regulating the interests of husband and wife in the movable property of either, which was *in esse* when the marriage took place. Perplexing questions sometimes arise as to what place shall be deemed the true matrimonial domicile in the sense of this rule. Mr. Justice Story supposes a case where neither of the parties has a domicile in the place where the marriage was celebrated, and the parties were there *in transitu*, or during a temporary residence, or on a journey made for that sole purpose *animo revertendi*, and says that the principle maintained by foreign jurists in such cases would be that the actual or intended domicile of the parties would be deemed to be the true matrimonial domicile; or, to express the doctrine in a more general form, that the law of the place where, at the time of the marriage, the parties intended to fix their domicile would govern all the rights resulting from the marriage. He also supposes the case of a man domiciled in one State marrying a lady domiciled in another State, and says that foreign jurists would hold that the matrimonial domicile would be the domicile of the husband if it was the intention of the parties to fix their residence there, or the domicile of the wife if it was their intention to fix their residence there, or in a different place from the domicile of either the husband or wife if they intended to establish their matrimonial domicile in some other place. He then refers to the decisions of the courts of Louisiana, adopting the same principle, and concludes that, "under these circumstances, where there is such a general consent of foreign jurists to the doctrine thus recognized in America, it is not, perhaps, too much to affirm that a contrary doctrine will scarcely hereafter be established; for, in England as well as in America, in the interpretation of other contracts, the laws of the place where they are to be performed has been held to govern. Treated, therefore, as a matter of tacit matrimonial contract (if it can be so treated), there is the rule of analogy to govern it; and treated as a matter to be governed by the municipal law to which the parties were, or meant to be, subjected by their future domicile, the doctrine seems equally capable of a solid vindication." Story's Confl. of Laws, §§ 191-199. All perplexity on this subject is removed where, as in this case, the place where the marriage is celebrated, the domicile of the wife, and the establishment of a home after the marriage, concur. The place of contract and the place of performance being the same, on legal analogies there would seem to be no doubt that that place would be the matrimonial domicile, and that the incidents of the marriage would be determined by the law of that place.

Nor can that question, which has given rise to great diversity of opinion where new property has been acquired after the marriage, and in a new domicile, arise in this case, for the property to which this controversy relates was *in esse* at the time of the marriage, and the matrimonial domicile then established continued until the husband's death; and it is universally allowed that, when a marriage takes place without settlement, the mutual rights of the husband and wife in each other's movable property are to be regulated by the law of the matrimonial domicile, so long as that remains unchanged. Westlake's Int. Law, § 366.

The French law recognizes a conjugal domicile analogous to what is known in our law as a matrimonial domicile, and is distinguished from that domicile which is required for the purpose of contracting a lawful marriage; and the law of that country, with respect to the effect of the conjugal domicile upon the rights of husband and wife in the movable property of either spouse, is in accordance with the views above expressed. George Merrell, a witness called by the defendants, who is not an attorney or *avocat* in the French courts, being a foreigner who studied law in New York City, said that a foreigner cannot acquire a domicile in France without complying with Article 13 of the Code, except it be a matrimonial domicile, which he defines to be the residence necessary to confer jurisdiction on the magistrate for the celebration of the marriage; and that in the case of an American citizen establishing his residence in France, with intention of making that his permanent home, marrying and living there, not having received the government authorization, according to the Code, his personal property would be distributed according to the American law. On the other hand, M. Goiraud, a French lawyer called by the complainant, testified that the domicile necessary for a foreigner to contract a legal marriage required only a residence, in fact, for six months, and that the domicile which was to govern the marriage relations of the parties would be the conjugal domicile, which he defined to be the domicile which had been chosen by the parties, either at the time of the marriage or after the marriage, in order to be finally settled. M. Clunet, *avocat* of the court of Paris, called by the complainant, testified that French jurisprudence, in order to establish the marriage relation of the parties married without a contract, takes, as a principle, their supposed intention, and finds the expression of that intention in what is called the conjugal domicile, or, in other words, the place where, after the marriage, the parties establish themselves. Both these witnesses agree that government authorization is not required for the establishment of a conjugal domicile in France, which, when the marriage is celebrated in France without a contract, will make the property of a foreign-born husband subject to the community law.

The decisions of the French courts sustain the opinions given by M. Goiraud and M. Clunet. In Breul's Case, Sirey (1854), 2,105, translated in 4 Phillim. Int. Law, 226, and more fully in Cole on Domi-

cil, 45, 47, Breul was a Hanoverian; he married a Frenchwoman in France, and died there; at the time of his marriage, and at his death, he was domiciled in France, but had not obtained a governmental authorization for that purpose. On appeal, the question was whether there was a community of goods between husband and wife. The court held that there was, and that foreigners were capable of entering into all contracts depending on the law of nations, and could, when they marry in France, accept tacitly the rule of community, established by law, in the same way as they might have made that rule the subject of express stipulation in a formal contract; that, to make this principle apply to foreigners, it was not enough that the marriage was celebrated in France; but that it was also necessary that the intention of the contracting parties to adopt the community should be manifested by affirmative acts; that the establishment of a domicile in France had always been regarded as the most positive manifestation of such intention; that the domicile ought to have an importance to distinguish it from simple residence, but it was not necessary that it should have been authorized by the government under Article 13, for the reason that the object of this authorization was to confer on the foreigner all the civil rights of native-born Frenchmen, and that these rights were not necessary in a foreigner in order to enable him to enter into matrimonial conventions, which are purely of the *jus gentium*.

In *Lloyd v. Lloyd*, Sirey (1849), 2, 220; in *Cole on Domicil*, 37, and translated in a note to *Whicker v. Hume*, 13 Beav. 401, James Lloyd, a foreigner, whose birthplace was unknown, and who was, by presumption and residence, an Englishman, came to France, and established himself there permanently. In 1836 he married, at Paris, a Frenchwoman, without a marriage settlement. He had three children by the wife before marriage, and three afterwards. He continued his residence, and died in Paris, leaving his wife and the six children surviving him. The widow claimed, before the French court, that portion of the property which would belong to her by the French law, if she and her husband were married under the *régime* of the *communauté des biens*. Her right depended on whether, at the time of the marriage, the decedent had a legal domicile in France. He never had applied for or obtained an authorization under Article 13 of the Code. The Tribunal of the Seine decided against her claim, but the decree was reversed by the Court of Appeal, and the claim of the widow sustained. The court said that "it is fruitless to contend that the domicile of James Lloyd, in France, was not accompanied by the authorization of the government, required by Article 13, and therefore it cannot be taken into consideration as regulating the conjugal domicile, for it is a fixed principle of law, as well before as since the Code, that a foreigner, even when he preserves that quality, could acquire a domicile in France; that Article 13 of the Code did not intend to change this state of things; that it is only when a foreigner wishes to possess such a domicile in France, as will confer upon him all civil rights, that the

authorization of government is required; that in the present case it is not a question as to a civil right, exclusively appertaining to a French citizen; that the tacit agreement as to the community of goods, resulting from submission to Articles 1393, 1399, 1340, and the succeeding articles, was purely derived from the law of nations."

In Fraix's Case, Fraix was a Savoyard, and settled in Paris, where he married his second wife, a Frenchwoman. The question was whether he married under the French *communauté des biens*. The court held that although he had not been authorized by the government to establish his domicile in France, a domicile was not necessary to make the *communauté* applicable, which is presumed to have been the intention of the parties when they fixed themselves in France. 4 Philim. Int. Law, 231.

In Ghisla's Case, decided in 1878, Ghisla was a Swiss by birth. He married a Frenchwoman in France, and before and after his marriage had his domicile in Marseilles, and in that place died. His widow claimed the benefit of the community law, and it was adjudged to her by the court of Aix, the ground of the decision being that, where one of the married couple is French, and the other a foreigner, they are, in the absence of a contract, governed by the law of the conjugal domicile; that the intention of the parties is to be considered before their nationality, and that to the fixing of the conjugal domicile, government authorization was not required, for whatever appertains to the marriage belongs rather to the *jus gentium* than to the civil law, properly speaking. Jour. Int. Law, 1878, 610. In Dages v. Laborde, it was held that the legislation applicable to the civil interests of a marriage was that of the place where the married couple established their domicile immediately after the marriage, and where it appeared that it was their intention to fix the principal place of their business, and to raise their family, and that this domicile was denominated their matrimonial domicile. Court of Pau, 1835, affirmed in the Court of Cassation, December, 1836, Journal du Palais, 1837, 1, 537.

Giovanetti v. Orsini, Sirey (1855), 699, is the converse of the cases cited. In that case a Frenchman, while domiciled in Tuscany, married an Italian woman in Florence. They afterwards removed to France. On her death, the question arose in France as to the matrimonial *régime* governing the estate of the deceased wife. There had been an agreement, subsequent to marriage, with respect to property, not valid under the French law. The court held that the marriage having been contracted at Florence, and the parties having, at the epoch of their marriage, fixed their matrimonial domicile in Tuscany, the marriage was necessarily under the influence of the Roman law, which governed such matters in Tuscany, according to which, agreements subsequent to marriage were authorized and valid. Cole on Domicil, 41.

Morand v. Commune de Mèzère, Sirey (1873), pt. II., 148, much relied on by the defendants, is not in point. The parties were married in Sardinia, and then removed to France. The husband settled in

Paris, and had his principal establishment there, but did not obtain authorization from the government. His daughter was born in France. He died in 1855, and his widow in 1867, making the commune her residuary legatee. The court held that Morand was a foreigner, and so were his wife and daughter, and therefore the laws of France did not govern the succession. The effect of a French marriage, followed by a conjugal domicile in France, was in no wise involved.

I think it is clearly shown, not only by the testimony of the French lawyers, who were witnesses in this case, but also by the French decisions, that it is the law of that country that the marriage of a foreigner in France, without any contract, followed by a conjugal domicile in France, will subject the property of the married persons to the community law, and that a government authorization under Article 13 of the Code is not necessary to the establishment of such a domicile.

The decree of the chancellor should be affirmed.

Decree unanimously affirmed.

FRIERSON v. WILLIAMS.

SUPREME COURT, MISSISSIPPI. 1879.

[*Reported 57 Mississippi, 451.*]

GEORGE, C. J.² The plaintiff in error filed his bill in the Chancery Court of Coahoma County against John Williams and his wife for the purpose of collecting out of the separate estate of Mrs. Williams a note for six thousand and fifty dollars, made by Williams and wife, in February, 1873, payable to the order of Williams, the husband, and by him indorsed to the plaintiff in error for money then advanced by the latter to said Williams. The note was made at New Orleans, in the State of Louisiana, where Williams and his wife reside. The property sought to be charged with the debt is land situated in Coahoma County, and is the separate estate of Mrs. Williams, under a devise made to her by her sister, Mrs. McGuire, who died in 1863. By her will she provided as follows: "My whole estate, real and personal, shall go to my sisters, Ellen Mayes, wife of R. B. Mayes, and Louisa Williams, the wife of John Williams, for and during their natural lives; and this bequest is to their sole and separate use in which their husbands respectively shall have no right or interest." . . .

It is next insisted that by the law of Louisiana the promissory note of the wife, made as surety for her husband, is void for want of the capacity of the wife to enter into such a contract, and that, being void by the *lex loci contractus*, it is void everywhere. This position is true,

if the giving of the note has no other effect than what it purports to have on its face, viz., a personal obligation of the wife. But it is charged in the bill and admitted by the demurrer, that at the time this note was made in Louisiana the wife had a separate estate in realty, situated in this State, and that she contracted with reference to this separate estate, and intended to charge it by the promissory note in controversy. Whether this purpose can be carried out with reference to realty here, notwithstanding the fact that the note is void by the law of Louisiana, is the question presented for our consideration. The note, if made here, would be equally void by our laws to bind the wife personally; yet, notwithstanding this, it would be held, if made with the intent and purpose alleged in the bill, to be a valid charge against her separate estate situated here.

It is generally true that the capacity of a married woman to make a contract will be determined by the law of her domicile; but this is not the rule when her contract relates to her estate in realty, situated in another jurisdiction. Judge Story says: "The general principle of the common law is that the laws of the place where such [immovable] property is situate exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed, and lost only according to the *lex rei sitæ*." Story, Conf. Laws, § 424. And quoting from Sir William Grant: "The validity of every disposition of real estate must depend upon the law of the country in which that estate is situated;" he says: "The same rule would also seem equally to apply to express liens and to implied liens upon immovable estate." Mr. Burge, as quoted by Judge Story, in a note to section 445 of the same work, says: "The power to alienate immovable property by contract was a quality impressed on the property; that the law from which it was derived, or by which it is regulated, was a real law; and that the existence of this power and the validity of its exercise must be decided by the law of the country in which the property was situated." And it is said by a learned author: "No sovereignty can permit the intrusion on its soil of a foreign law. Such a law may be accepted by comity in cases in which a contested issue, the law applicable to which is foreign, comes up for determination in a home court. But the imposition of any other law than the *lex rei sitæ* as to property, would be to give foreign subjects and foreign laws an absolute control, unchecked by any discretion of the home courts, over a subject-matter essential not merely to the independence, but the vitality of the State. . . . The mischief is cured by the adoption of the rule *lex rei sitæ regit*; whoever may be the owner, or wherever the contract was made, the law of the land reigns. No other law, either as to the transfer or control of the property, is to intrude." Wharton, Conf. Laws, §§ 278, 280. These rules apply to marital rights in realty. Judge Story, after speaking of the rights of husband and wife as to personal property situated beyond the mat-

rimonial domicil, says: "But real or immovable property ought to be left to be adjudged by the *lex rei sitæ* as not within the reach of any extraterritorial law;" and in *Vertner v. Humphreys*, 14 S. & M. 180, 143, this court said that, "As to immovable property, the law of the place where it is situated fixes the rights of husband and wife in it."

The application of these principles will furnish a safe solution of the question under consideration. The capacity of Mrs. Williams to take this property, and her rights and powers over it, are derived from and regulated by the law of this State. Her power of disposition and dealing with it are, by our laws, impressed on the property itself. As to none of these things has the law of Louisiana the slightest influence. If she had made a contract expressly disposing of this property, it will not be denied that, though void by the laws of Louisiana, either for her want of capacity to act, or the want of the observances of the forms and solemnities prescribed by those laws, yet, if valid by the law of this State, it would have been good. The contract here is not strictly of that character, yet the making of it is the exercise of the power of the wife to dispose of her estate; for whenever that power is denied, the power to charge it with her debts is denied also, and the charge can only be made effectual by the actual or threatened alienation of the estate, under a decree of the Chancery Court. The charging of her separate estate for the payment of money does not pass any actual interest in the land, but it is the first and essential step for a judicial disposition of the estate to satisfy the charge, and the exercise of a power of administration and control over it, which, as we have seen, is governed solely by the *lex rei sitæ*. To show that this is its true nature, we have only to suppose that, by the law of Louisiana, the note was a charge on her realty situated there, and was not by our law a charge on the realty situated here. In such a case, it would be evident that an attempt to enforce it here against her real estate could not succeed. If success could attend such an effort, then the several rights and powers of husband and wife, as to realty, would not be fixed and governed by the laws of the situs; and the act of a wife, done in a foreign State, would have the effect of disposing of her realty here, contrary to our laws.

But there is no real conflict between the laws of Louisiana and Mississippi in reference to the contract. By both laws the note is void for what it purports to be on its face, — a personal obligation of the wife; and it is void for the same reason in both, viz., the personal incapacity of the wife. The difference between the two laws is as to the effect on the real property of the wife in the respective jurisdictions of the two States, and as to which, as we have above seen, the law of the State in which the realty is situated is the exclusive test. If the note had not been void by our laws, as the personal obligation of the wife, we should nevertheless, out of comity to a sister State, adjudge it void to that extent, if attempted to be enforced here; but the principle of

comity does not require a State to regard the laws of any other State, so far as they may affect contracts in relation to real estate situated in the former State.

Decree reversed, demurrer overruled, and cause remanded.

LA SELLE v. WOOLERY.

SUPREME COURT OF WASHINGTON. 1895, 1896.

[*Reported 11 Washington, 337 ; 14 Washington, 70.*]

HOTT, C. J. Appellant, William F. Collins, in a suit brought in King County against the respondent, William La Selle, duly recovered judgment. To this action and judgment the respondent, Marian E. La Selle, wife of said William La Selle, was not a party. Execution issued on said judgment, which was placed in the hands of J. H. Woolery, sheriff of King County, the other appellant. He made a levy upon a piece of real estate situated in King County, of which the paper title was in the name of said Marian E. La Selle. This suit was then brought by the respondents, and thereby they sought to enjoin the sale of the property levied upon, and to have it decreed that such property was not subject to the lien of the judgment.

It was conceded that the property, though standing in the name of the wife, Marian E. La Selle, was the community property of herself and her husband, William La Selle. It was, therefore, under the rule established by numerous decisions of this court, subject to the lien of the judgment against the husband alone if the debt upon which such judgment was rendered was that of the community. It is equally well established by the adjudications of this court that such property was not subject to the lien of such judgment if the debt for which it was rendered was the separate debt of the husband. It must follow that the nature of the debt which was the foundation of the judgment is the material question to be determined upon this appeal. If it was that of the community, the sheriff should have been allowed to proceed to satisfy the judgment by a sale of the property. If it was the debt of the husband alone, the appellants were rightfully restrained from proceeding further against the property in question. The foundation of this judgment was one against the husband alone, made and entered in the State of Wisconsin, and the foundation of that one was a liability incurred by the husband to the appellant Collins in the prosecution of his business as a contractor and builder and proprietor of a sash and door factory, and was for materials sold to him to be used in the con-

struction of houses and to supply his factory. At the time this liability was incurred, and the judgment in Wisconsin rendered, the respondents were living together as husband and wife in the State of Wisconsin. Afterward they removed from said State, and, from a time preceding the date of the judgment rendered in King County, had been living together as husband and wife in this State. . . .

The substantial question presented by the facts is as to the status of the debt which was the foundation of the judgment in Wisconsin in reference to the property of the husband or husband and wife situated in that State. It appears from the statutes set out in the answer that in that State there is no such thing as community property as understood here, nor is there any such thing as separate property of the husband as defined by our laws. The wife alone could own separate property, and the provisions in relation to its acquisition were substantially the same as in this State. All other property was that of the husband, whether it was acquired in such a manner as to make it under our laws his separate property or that of the community. And all of his property under the laws of that State could be subjected to the payment of debts incurred by him alone. It will be seen from these provisions that a debt incurred by the husband could there be enforced against all of the property acquired by the husband and wife either before or after marriage excepting such as under the laws of that State would be the separate property of the wife. This is substantially the result of the laws of this State as interpreted by former decisions of this court.

In our opinion the comity which one State owes to another goes to the substance rather than the form of things. If a certain right is given in one State as to property of a certain nature, comity would require that those rights should be enforced in another State as to property of the same nature though it might be called by a different name. In the State of Wisconsin property which was acquired by the joint labors of the husband and wife, though called the property of the husband, was subject to the payment of debts incurred by the husband in the prosecution of business for the support of the family. Property acquired in the same manner in this State belongs to the community, but is subject to a liability incurred by the husband alone in the prosecution of business for the same object. Hence, under the rule above suggested, comity requires that a debt which under the laws of that State could be enforced against property which from the nature of its acquisition would be that of the community in this State, should be here enforced against property belonging to the community.

There is nothing in the policy of our legislation which will prevent the application of the rule above stated to the facts of this case. On the contrary, the general policy of this State upon the question of the liability of property of the community and of the respective spouses for debts incurred by the husband alone in the prosecution of any business is in substantially the same line as that of the State of Wisconsin. But whether it is or not, so long as the rights of the parties are adjudi-

cated under the laws of this State, its citizens have no ground of complaint, whatever may be the result as to those of other States. And since what we have said has been founded upon our statute, and the rights adjudicated thereunder have been in the light of the facts shown by the record, the respondents cannot complain.

The judgment will be reversed, and the cause remanded with instructions to overrule the demurrer to the affirmative defences pleaded in the amended answer.

Rehearing granted.

GORDON, J. A majority of the court are of the opinion that a wrong conclusion was reached at the former hearing.

The case is fully stated in the former opinion, in the course of which opinion the court said: "If a certain right is given in one State as to property of a certain nature, comity would require that those rights should be enforced in another State as to property of the same nature."

Upon further consideration, we think that this is extending the doctrine of comity too far. While comity might require that rights so acquired, against personal property merely, should be enforced in this State as against such property (*Harrison v. Sterry*, 5 Cranch, 289; *Wharton*, Conflict of Laws, § 324), we do not think it ought to be extended to property subsequently acquired in this State, although of the "same nature," and this principle is wholly inapplicable to real property. The law of the place where the real property is situated must be held to control its disposition, whether by voluntary or forced sale. *McCormick v. Sullivan*, 10 Wheat. 192.

Upon this subject no less a writer than Story has said: "All the authorities in both countries [England and America], so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate." Story, Conflict of Laws, § 428. "Any title or interest in land or in other real estate can only be acquired or lost agreeably to the law of the place where the same is situate." *Id.* § 365.

The character of the property, as regards the question of its being the separate property of either of the spouses, or the property of the community consisting of both spouses or otherwise, is fixed by the law of the State where such property, if real property, is situated. So, too, the character of the debt is determined by the law of the place where it arose. If by the law of Wisconsin it was the sole individual debt of the husband, it retained that character here. Its status was fixed by the law of the place of its creation. The debt which the appellants are here seeking to enforce, being by the law of Wisconsin where it arose merely the separate individual debt of the husband, enforceable only against his separate individual property, it follows that the judgment rendered upon that debt cannot be satisfied out of

the real property of the community acquired in this State long after the debt arose and judgment was rendered upon it.

The doctrine of the common law is that: "In regard to the merits and rights involved in actions, the law of the place where they originated is to govern. . . . But the form of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act." Story, *Conflict of Laws* (8th ed.), § 558.

The settled rule is that the law of the place where the contract was made must govern in determining the character, construction, and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to "the nature, extent, and form of the remedy, . . . whether arrest of the person or attachment of the property may be allowed; whether a debt is or is not discharged by operation of law, as insolvent laws, or barred by statutes of limitation; rights of set-off; the admissibility and effect of evidence; the modes of proceeding and the forms of judgment and execution." 2 *Abbott's Law Dictionary*, p. 86.

In the case of *Blanchard v. Russell*, 13 Mass. 1 (7 Am. Dec. 106), the Supreme Court of Massachusetts, speaking by Chief Justice Parker, say:—

"But the courtesy, comity, or mutual convenience of nations, among which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts; so that is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the State in which they are made, unless from their tenor it is perceived that they were entered into with a view to the laws of some other State. . . . The rule does not apply, however, to the process by which a creditor shall attempt to enforce his demand in the courts of a State other than that in which the contract was made. For the remedy must be pursuant to the laws of the State where it is sought; otherwise great irregularity and confusion would be introduced into the form of judicial proceedings."

The rule has long been established in this court that the community real property is not liable for the separate or individual debt of the husband. *Brotton v. Langert*, 1 Wash. 73 (23 Pac. 688); *Stockand v. Bartlett*, 4 Wash. 730 (31 Pac. 24). And it would be productive merely of confusion and disorder to limit the application of this rule to those debts only which are contracted within this State.

One result of such limitation would be that the court would be required in every case to resort to the law of the State where the debt arose in order to determine what property in that State would be liable for such debt, and then to permit such judgment creditor to have his judgment satisfied out of like property of the judgment debtor in this State, without regard to our own law upon the subject. And it would follow logically from such a rule that property of a judgment

debtor which is by our law exempt from levy and sale on execution could be subjected to the payment of a judgment for a debt incurred in some sister State where the exemption laws were different from our own. All these questions relate to the character and extent of the remedy, and not to the construction or validity of the contract, and they are governed and controlled by the *lex fori*, and not by the *lex loci contractus*; and to avoid interminable confusion the distinction must be observed.

For these reasons the order and judgment of the Superior Court will be affirmed.

SCOTT, DUNBAR, and ANDERS, JJ., concur.

Horr, C. J. (*dissenting*). The results which will flow from the rule announced in the foregoing opinion are such as to satisfy me that it cannot be the one required by comity. A husband residing in a sister State, possessed of ever so much property which, though the title is vested in him, is held for the benefit of himself and wife, and would from the manner of its acquisition be here held to be community property, and was there subject to debts for the benefit of the family, which would here be held to be community debts, can escape the payment of all the debts which may have been contracted on the faith of the property which he owned by converting such property into cash and removing to this State and investing it in real estate. That the laws of one State should be so construed as to allow a debtor in another, possessed of abundant means with which to pay all of his creditors, to evade the payment of just debts in this way, does not correspond with my ideas of comity. In my opinion the conclusion reached upon the former hearing was the correct one and should be adhered to.

CHAPTER VIII.

INHERITANCE.

SECTION I.

INTESTATE SUCCESSION.

LAWRENCE v. KITTERIDGE.

SUPREME COURT OF ERRORS, CONNECTICUT. 1852.

[Reported 21 Connecticut, 576.]

CHURCH, C. J.¹ The first decree of the Court of Probate appealed from was predicated upon facts essentially as follows, viz., Cephas Pettibone, the intestate, at the time of his death, was an inhabitant of, and had his domicile in, the State of Vermont, and was possessed of an estate there; and there was due to him here, from a citizen of this State, a debt of about one thousand dollars. Original administration upon his estate was granted in the State of Vermont, and was in progress when an ancillary administration was granted in this State. When the decree appealed from was made, there were no unsatisfied debts due from the estate here, or in Vermont, and nothing but a distribution of the estate remained to be done.

The intestate died, leaving brothers and sisters of the whole and half blood; all, excepting the late Augustus Pettibone, Esq., of Norfolk, who was a brother of the whole blood, residing in Vermont, or elsewhere, out of this State; and he had no other heirs at law. By the laws of Vermont, the brothers and sisters of an intestate of the whole and half blood are entitled equally to the estate, under the statute of distribution.

Upon the foregoing state of facts, the Court of Probate for the District of Norfolk was of opinion that the personal estate of Cephas Pettibone — the chose in action of one thousand dollars — should be distributed according to the laws of the State of Vermont; and that this could better be done, and without injury to any citizen of this State, by transmitting the money to the administrator there, and to the jurisdiction of the Court of Principal Administration, than to order

¹ Part of the opinion only is given. — Ed.

a distribution of it here. And therefore the decree appealed from was made.

The appellant, who is the representative of Augustus Pettibone, the brother of the whole blood residing in the District of Norfolk, objects to this decree, and appeals from it. He claims that the assets or money in the hands of the administrator here should have been distributed here, and according to the laws of this State, which prefer a brother or sister of the whole blood to one of the half blood.

1. We had supposed that the law of the country of the domicile of an intestate governed and regulated the distribution of his personal estate; and that this was a principle of international law, long ago recognized by jurists in all enlightened governments, and especially recognized by this court in the recent case of *Holcomb v. Phelps*, 16 Conn. R. 127, 133, in which we say that "It certainly is now a settled principle of international law, that personal property shall be subject to that law which governs the person of the owner, and that the distribution of and succession to personal property, wherever situated, is to be governed by the laws of that country where the owner or intestate had his domicile at the time of his death." *Sto. Conf. Laws*, 403, *in notis*, §§ 480, 465; 2 *Kent's Com.*, Lect. 37; 2 *Kaine's Prin. Eq.*, 312, 326; *Potter v. Brown*, 5 *East*, 124; *Balfour v. Scott*, 6 *Bro. Parl. Cas.* 550 (*Toml. ed*); *Bempde v. Johnstone*, 2 *Ves.* 198; *Pepon v. Pepon*, *Amb.* 25, 415; *Guier v. O'Daniel*, 1 *Binn.* 349, *in notis*; *Harvey v. Richards*, 1 *Mason*, 381.

It is not necessary that we should now examine the reasons, whether of public policy or legal propriety, which have led the tribunals of civilized nations to relax from antiquated notions on this subject; some of these are well considered by Judge Story, in the case of *Harvey v. Richards*, 1 *Mason*, 381, and by Chancellor Kent, in his *Commentaries*, vol. 2, Lect. 37.

It is true that it is in the power of every sovereignty, and within the constitutional powers of the States of this Union, to repudiate this salutary doctrine in its application to themselves, or to modify it for what they may suppose to be the protection of their own citizens; but without some peculiar necessity, it cannot be supposed that any well-regulated government will do it. It was claimed in argument, in this case, that this had been done in this State, and by the provision of the 49th section of our statute for the settlement of estates (*Stat.* 357), by declaring that when there are no children, etc., of an intestate, his "real and personal estate shall be set off equally to the brothers and sisters of the whole blood." But it was not the purpose of this provision to disregard the universal and salutary doctrines of the law to which we have referred, but only to regulate the descent and distribution of the estate of our own citizens. This provision of our statute is not peculiar to ourselves; a similar one, we presume, may be found in the codes of other States; at least, imperative enactments exist in every State, directing the distribution of estates; but none of them are intended to

repeal the law of the domicil in its effect upon the personal estate of the owner. The controversy in the case of *Holcomb v. Phelps* arose under the same section of our law as does the one now under consideration, and the result of that case must settle this question, if it be one.

There are cases in which the law of the domicil has been modified or restrained, in its full operation, for what courts have supposed to be the proper protection of the rights of the citizens of their own States; but these are generally confined to cases in which creditors are in some way interested under insolvent proceedings, assignments, or bankrupt laws, and never, we believe, are extended to mere cases of distribution, as here claimed. *Sto. Conf. L.*, 277, § 387.¹

LYNCH v. PROVISIONAL GOVERNMENT OF PARAGUAY.

COURT OF PROBATE. 1871.

[*Reported Law Reports, 2 Probate and Divorce, 268.*]

THE plaintiff claimed probate (as universal legatee) of the will of Francisco Solano Lopez, who died at Paraguay on the 1st of March, 1870. A caveat having been entered by the defendants, they were called upon to propound their interest, and they accordingly filed the following declaration:—

“1. That Francisco Solano Lopez, the deceased in this cause, was a native of Paraguay, and at the time of his death, which took place in Paraguay, on or about the 1st day of March, 1870, was domiciled there.

“2. That by the law of nations, and by the law of England, the succession to the personal estate and effects of the said deceased, wheresoever situate, and also the right to administer to the said estate, is to be governed by the law of Paraguay.

“3. That by a decree of the Government of Paraguay, dated the 4th day of May, 1870, all the property of said deceased, wheresoever situate, is declared to be the property of the nation of Paraguay, and that such decree is valid and now binding and operative by the law of Paraguay.

¹ *Acc. Somerville v. Lord Somerville*, 5 Ves. 749, 786; *Dogliani v. Crispin*, L. R. 1 H. L. 301; *Hewitt v. Cox*, 55 Ark. 225, 17 S. W. 873; *Estate of Apple*, 66 Cal. 432; *In re Afflick*, 3 McArth. 95; *Russell v. Madden*, 95 Ill. 485; *Lewis's Estate*, 32 La. Ann. 385; *Hairston v. Hairston*, 27 Miss. 704; *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596. But see *Succession of Petit*, 49 La. Ann. 625, 21 So. 717. *Contra*, by statute, *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61.

So the widow's allowance is to be governed by the law of her husband's domicil at death. *Mitchell v. Ward*, 64 Ga. 208. — Ed.

"4. That by the now existing law of Paraguay, no will or testamentary paper whatsoever of the said Francisco Solano Lopez is entitled to probate, or has any validity whatsoever in England or elsewhere.

"5. That by the now existing law of Paraguay, the said Government of Paraguay, or their officer, or attorney, is entitled to become the sole personal representative in England of the said deceased, and to take the grant of letters of administration in England of his personal estate and effects situate in England.

"6. That Richard Lees, the defendant, is by a power of attorney, duly executed by the President of the Republic of Paraguay on behalf of the said republic, dated the 22d day of December, 1870, duly authorized to oppose the grant of probate of any testamentary document of the said deceased, and the grant of any letters of administration of the estate of the said deceased, to any other person, and to apply for letters of administration of all the personal estate and effects of the said deceased situate in England, to be granted to him under such power of attorney, and that he is by reason of the premises the only person entitled to be constituted the personal representative of the said deceased in England."

To this declaration the plaintiff demurred, and the demurrer came on for argument on the 4th of May, 1871.¹

LORD PENZANCE, having stated the declaration, said: To this declaration the plaintiff has demurred, and the ground of demurrer relied upon is, that the decree upon which the defendants' claim is based is not alleged to have been in force at the date of the testator's death. Some other points were taken in argument raising a discussion of considerable interest; but, on reflection, I am satisfied that the date of the decree relied upon by the defendants is fatal to their claim in this suit. The general proposition that the succession to personal property in England of a person dying domiciled abroad is governed exclusively by the law of the actual domicil of the deceased was not denied; but it was affirmed by the plaintiff that this proposition had relation only to the law of the domicil as it existed at the time of the death of the individual in question, and that no changes made in that law after the date of the death can by the law of this country be recognized as affecting the distribution of personal property in England. This contention appears to me well founded. A general statement of the rule of law on this head is to be found in § 481 of Story's Conflict of Laws. He says: "The universal doctrine now recognized by the common law, although formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicil of the intestate at the time of his death." The words "at the time of his death" are here carefully inserted as part of the principal proposition, and a long list of authorities is cited in support of that proposition, in none of which is any passage to be found indicating that those words are not a necessary part of it. But it was ingeniously

¹ Arguments of counsel are omitted. — Ed.

argued that the decree in question has by the law of Paraguay a retrospective operation, and that, though the decree was, in fact, made since the death, it has by the law of Paraguay become part of that law at the time of the death. In illustration of this view it was suggested, that if the question were to arise in a court of Paraguay such court would be bound by the decree, and therefore bound to declare the provisions of the decree to be effective at and from the time of the death. This may be so; but the question is, whether the English courts are bound in like manner; or, more properly speaking, the question is, in what sense does the English law adopt the law of the domicile? Does it adopt the law of the domicile as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law? No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust. Inconvenient, for letters of administration or probate might be granted in this country which this court might afterwards be called upon, in conformity with the change of law in the foreign country, to revoke. Unjust, for those entitled to the succession might, before any change, have acted directly or indirectly upon the existing state of things, and find their interests seriously compromised by the altered law. As, therefore, I can find no warrant in authority or principle for a more extended proposition, I must hold myself limited to the adoption and application of this proposition, that the law of the place of domicile as it existed at the time of the death ought to regulate the succession to the deceased in this case. Under that law the present defendants have no *locus standi* to oppose any will the testator may have made, and no concern with his estate. The demurrer must therefore prevail.

I will only further observe, that if the decree upon which the defendants rely is one entitled to be recognized and enforced in this country in regard to the personal property of the deceased, the defendants' claim under it will be equally good, whether there is a will or not. It does not devolve upon this court to adjudicate upon the property of the deceased, but only to ascertain whether he has made a good will; and, if not, to grant administration of his effects. The defendants would, in any event, therefore, have to establish their claim under the decree in the proper courts of this country before they can obtain the right to appropriate the property of which the deceased died possessed in England.

If it should there be held that this decree in Paraguay, penal in its character, and made after the death of the person to be affected by it, is one which the English courts will not enforce upon his personal property in this country, this court will have done well in not permitting those who have no interest in the estate to provoke a litigation upon the validity of any will the deceased may have made. If a contrary conclusion should be arrived at, and the personal property of which the deceased died possessed shall be determined to have passed to the de-

fendants by virtue of the decree upon which this decision arises, no will, however made, can operate upon it, and the proceedings in this court can neither prevent nor retard the defendants in the acquisition of their rights.

The court accordingly pronounced for the demurrer, with costs.

SECTION II.

TESTAMENTARY SUCCESSION.

IN RE MARTIN.

COURT OF APPEAL. 1900.

[*Reported* [1900] *Probate*, 211.]

APPEAL from the judgment of Sir F. JEUNE, President, allowing probate of a will.¹

LINDLEY, M. R.² The will which is in question in this case was made in this country by a Frenchwoman before her marriage, and was not attested as required by English law. By English law, by which I mean English law irrespective of all foreign law, the will is therefore clearly invalid. But foreign law must be taken into account. Those principles of private international law which are recognized in this country are part of the law of England; and on those principles the validity of the will, so far as it affects movable property, depends on the law of the domicile of the testatrix when she died. The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognized in this country and are part of its law. Until the question of the domicile of the testatrix at the time of her death is determined, the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicile at her death by the evidence of French legal experts. The preliminary question, by what law is the will to be governed, must depend in an English court on the view that court takes of the domicile of the testatrix when she died. If authority for these statements is wanted, it will be found in *Bremer v. Freeman*, 10 Moo. P. C. 806; see pp. 359 *et seq.*; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301; and *In re Trufort* (1887), 36 Ch. D. 600. In each of the last two cases a foreign court had determined the domicile, and the English court had also to determine it, and did determine it to be the same as that determined by the foreign court. But, as I understand those cases, the

¹ The statement of facts, and the judgment of Sir F. JEUNE, are omitted. — ED.

² Part of the opinion is omitted. — ED.

English court satisfied itself as to the domicile in the English sense of the term, and did not simply adopt the foreign decisions. The course universally followed when domicile has to be decided by the courts of this country proceeds upon the principles to which I have alluded.

But, further, the validity of a will of movables made by a person domiciled in a foreign country at the time of such person's death not only may, but must, depend on the view its courts take of the validity of the will when made, and on its subsequent revocation if that question arises. These questions may or may not turn on the domicile of the testator as understood in this country. For example, in this case it is agreed on all hands that by the law of France the will in question, being a holograph will made by a French subject, was valid when made, whatever her domicile may have been when she made it. It is also agreed on all hands that by French law marriage does not revoke the prior wills of the spouses. But the testatrix married a Frenchman in this country after she made her will, and the question whether her will was thereby revoked as to her movables is the real question on which this case turns.

By whatever court this question is to be decided, the English law of marriage, which in such a case involves and, indeed, turns on English views of domicile, must be considered. If this view be ignored, the effect of the marriage will be inadequately and, indeed, erroneously ascertained. If the domicile of the testatrix is to be treated as English, when she became a married woman her will was revoked by her marriage, for such is the law of England whatever the intentions of the parties may be: 1 Jarman on Wills, c. 7; but if her domicile was French, her will would not be revoked by English law, and still less by French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him. The effect of her marriage must, therefore, depend on the English view of his domicile. It would be useless, and, indeed, entirely misleading, to ask a French expert what effect the French law would give to an English marriage, without explaining the English law to him, and no explanation of that law would be adequate or correct if it excluded the English view of the domicile of the parties.

Having thus stated the principles which, in my opinion, ought to be applied to the case, I proceed to consider the facts and the evidence of the experts called at the trial. As already stated, the will was made in England by a Frenchwoman in the French language, and was a holograph will valid by the law of France whether she was then domiciled in England or France. It was made in 1870. She was in service in England, and this by French law rendered her domicile (in the French sense) English at that time. She afterwards set up a laundry business in London. Her principal establishment was therefore here, and, according to French law, she was clearly domiciled (in the French sense) in England. In May, 1874, she married a French refugee known by the name of Martin. He came over to this country in 1868, and made a living by

teaching French. There was no settlement, or anything in the nature of a settlement. The marriage was celebrated by a French Roman Catholic priest in a Roman Catholic church in the presence of a registrar. At the time of the marriage both the man and the woman signed a declaration stating that they were both *domiciliés* in London. They lived together in London for some years and carried on the laundry. In 1881, 1884, and 1888, leases of the laundry house were granted to the husband. In 1890 the husband and wife separated; he assigned the leases to her and returned to France, where he has ever since lived and lives now. His wife remained here and continued to carry on the laundry business until her death in January, 1895. It was believed that she had died intestate, and her brother obtained letters of administration to her estate. The will, which had been sent to France in 1870 and had been deposited with a notary, was brought forward recently by the testatrix's sister, who was constituted by it her residuary legatee. At her instance the letters of administration have been revoked, and probate of the will has been granted. The will has been judicially recognized as valid in France. But as the proceedings there were *ex parte*, I attach little importance to this fact, although no appeal has yet been made to set aside the order so obtained.

The learned President decided, and, in my opinion, rightly decided, that the domicile of the testatrix in the English sense was French when she died. It became necessary, therefore, to determine whether by the law of France her will was valid when she died. Experts were called and examined and cross-examined at great length on a number of points, many of which are not now, at all events, material or in controversy. The experts all agreed that the will was valid when made. They also all agreed that according to French law the testatrix was domiciled (in the French sense) in England when she made her will and when she married. They also all agreed that, according to French law and in the French sense, her husband was domiciled in England when he married. Treating the husband and wife as domiciled in England when they married, they differed as to the consequences. MM. Gaustalla, Gorostarzu, and Mesnil think that the marriage revoked the will. M. Mesnil is quite clear upon the point; the others are less so, but they, I think, take the same view. M. Astoul, when first called, stated that the marriage did not revoke the will; that it depended on nationality, not domicile, in the French sense. When recalled he apparently adhered to his opinion, but considered that the revocation might depend on the intention of the parties and on the adoption of the matrimonial *régime* by the spouses.

All these experts based their opinion on their view that at the time of the marriage the parties were domiciled in England, and they applied the English law of marriage to that state of things. But, as I have already pointed out, the English law of marriage, when considered with reference to its effect on property, involves, and in a case like this cannot be severed from, English views of domicile. The learned Presi-

dent came to the conclusion that the domicile of the husband at the time of the marriage was in France, not in England. But he also came to the conclusion that both husband and wife intended to marry according to English law, and that the English matrimonial law should and would govern their future property. He further considered that the law by which wills are revoked by marriage was not part of the English matrimonial law, but part of the English testamentary law, and that this law did not apply to the case. I confess I have great difficulty in adopting this view of the case. If, as the President considered, the parties were (according to English views) domiciled in France when they married, their marriage would not revoke their previous wills; and the French experts should have been told so, and should have been directed that their assumption of an English domicile was inadmissible. It is plain from their evidence that, according to French law, the domicile (in the French sense) of both husband and wife was in England and not in France, both when the marriage took place and when the testatrix died. I have no doubt that this conclusion was quite correct; but for the reasons I have already given I consider it necessary to examine the effect of the marriage according to English views of domicile.

I proceed, therefore, to inquire whether the President was right in his view that the husband was domiciled (in the English sense) in France and not in England when he married. We start with the fact that the husband had a domicile of origin in France. According to English law, the burden of proving that he lost that domicile and acquired an English domicile is on those who assert that he did so. Further, the domicile to be acquired must be domicile, not in the French sense, but in the English sense. The experts all tell us that he lost his French domicile, in the French sense, by coming to England and setting himself up as a teacher of languages here. But to acquire an English domicile in the English sense, not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently, or for an indefinite period: see the authorities collected in Dicey's *Conflict of Laws*, pp. 104 *et seq.* I cannot come to the conclusion that this intention is proved. . . .

The domicile of the testatrix being French when she made her will and when she died, it became necessary to ascertain the effect of her will on her movable property according to French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will; and if, in order to ascertain this, it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English court would take of the domicile, in the English sense, of the husband; and if I am right in my view of his domicile, the experts should have been told that by English law the marriage in this case did not revoke the wife's will. It was not necessary or, indeed, proper on this occasion to pursue the inquiry further and to see what matrimonial *régime* the parties intended

to adopt. It is not necessary to cite authorities to show that it is now settled that, according to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense. The authorities will be found collected in Foote's International Law, 2d ed., pp. 315-321, and Dicey's Conflict of Laws, pp. 648 *et seq.* This being clear the will was not revoked; and not revoked it was clearly valid as regards the wife's movable property. Section 18 of the Wills Act does not apply to the wills of foreigners who die domiciled abroad (Deane's Wills Act, note to § 18, cites an authority for this), and the effect of the marriage was not to vest the wife's property in the husband. French law did not so vest it, neither did international law as understood and administered in this country. The English law applicable to English people, and according to which a woman's personal property formerly vested in her husband on marriage, and according to which her will was revoked by marriage even before the Wills Act, could not, on principle, apply to French spouses married in England, but (according to English views) domiciled in France when they married.

In my opinion the will has been properly admitted to probate; but it will not apply to leasehold property, for that is not regarded as movable property, to which the *lex domicilii* is applicable. Dicey, p. 72. A great quantity of expert evidence was taken on the difficult question whether the French law of *communauté des biens* was to be applied to the property of these persons. As I understand the expert evidence, the question turns not only on the marriage, but on the effect of what the husband and wife did afterwards. This question may arise hereafter, but it does not arise now, and I purposely, therefore, say nothing more about it.

VAUGHAN WILLIAMS, L. J.¹ I agree in the conclusion of Sir F. JEUNE that the husband and wife intended to keep an establishment in England, and that they intended to marry under English law, and to adopt it as their matrimonial law; but I base this conclusion on the fact, which Sir F. JEUNE does not accept, that at the date of the marriage the husband had an English domicile.

MOULTRIE v. HUNT.

COURT OF APPEALS, NEW YORK. 1861.

[Reported 23 New York, 394.]

DENTO, J.² One of the requisites to a valid will of real or personal property, according to the Revised Statutes, is, that the testator should,

¹ Part of this opinion, and the concurring opinion of RIGBY, L. J., are omitted. — Ed.

² Part of this opinion, and the dissenting opinion, are omitted. — Ed.

at the time of subscribing it, or at the time of acknowledging it, declare, in the presence of at least two attesting witnesses, that it is his last will and testament. 2 R. S. p. 63, § 40. The will which the Surrogate of New York admitted to probate, by the order under review, was defectively executed in this particular—the only statement which the alleged testator made to the witnesses being that it was his signature and seal which was affixed to it. It was correctly assumed by the Surrogate in his opinion, and by the Supreme Court in pronouncing its judgment of affirmance, that the instrument could not be sustained as a will under the provisions of the Revised Statutes, but that, if it could be upheld at all, it must be as a will executed in another State, according to the law prevailing there; and, upon that view, it was established by both these tribunals as a valid testament. In point of fact the instrument was drawn, signed, and attested at Charleston, in South Carolina, where such a declaration of the testator to the witnesses, as has been mentioned, is not required to constitute a valid execution of a will. Mr. Hunt, the alleged testator, resided at that time in Charleston; but, some time before his death, he removed to the city of New York, and he continued to reside in that city from that time until his death. The will was validly executed, according to the laws of South Carolina.

Although the language of our statute, to which reference has been made, includes, in its generality, all testamentary dispositions, it is, nevertheless, true, that wills, duly executed and taking effect in other States and countries according to the laws in force there, are recognized in our courts as valid acts, so far as concerns the disposition of personal property. *Parsons v. Lyman*, 20 N. Y. 103. This is according to the law of international comity. Every country enacts such laws as it sees fit as to the disposition of personal property by its own citizens, either *inter vivos* or testamentary; but these laws are of no inherent obligation in any other country. Still, all civilized nations agree, as a general rule, to recognize titles to movable property created in other States or countries in pursuance of the laws existing there, and by parties domiciled in such States or countries. This law of comity is parcel of the municipal law of the respective countries in which it is recognized, the evidence of which, in the absence of domestic legislation or judicial decisions, is frequently sought in the treatises of writers on international law, and in certain commentaries upon the civil law which treat more or less copiously upon subjects of this nature.

If the alleged testator in the present case had continued to be an inhabitant of South Carolina until his death, we should, according to this principle, have regarded the will as a valid instrument, and it would have been the duty of our probate courts to have granted letters testamentary to the executors named in it. The statute contemplates such a case when it provides for the proving of such wills upon a commission to be issued by the Chancellor, and for granting letters upon a will admitted to probate in another State. 2 R. S. p. 67, §§ 68, 69. These provisions do not profess to define under what circumstances a will

made in a foreign jurisdiction, not in conformity with our laws, shall be valid. It only assumes that such wills may exist, and provides for their proof.

The question in the present case is, whether, inasmuch as the testator changed his domicile after the instrument was signed and attested, and was, at the time of his death, a resident citizen of this State, he can, within the sense of the law of comity, be said to have made his will in South Carolina. The paper which was signed at Charleston had no effect upon the testator's property while he remained in that State, or during his lifetime. It is of the essence of a will that, until the testator's death, it is ambulatory and revocable. No rights of property, or powers over property, were conferred upon any one by the execution of this instrument; nor were the estate, interest, or rights of the testator in his property in any way abridged or qualified by that act. The transaction was, in its nature, inchoate and provisional. It prescribed the rules by which his succession should be governed, provided he did not change his determination in his lifetime. I think sufficient consideration was not given to this peculiarity of testamentary dispositions, in the view which the learned Surrogate took of the case. According to his opinion, a will, when signed and attested in conformity with the law of the testator's domicile, is a "consummate and perfect transaction." In one sense it is, no doubt a finished affair; but I think it is no more consummate than a bond would be which the obligor had prepared for use by signing and sealing, but had kept in his own possession for future use. The cases, I concede, are not entirely parallel; for a will, if not revoked, takes effect by the death of the testator, which must inevitably happen at some time, without the performance of any other act on his part, or the will of any other party; while the uttering of a written obligation, intended to operate *inter vivos*, requires a further volition of the party to be bound, and the intervention of another party to accept a delivery, to give it vitality. But, until one or the other of these circumstances — namely, the death, in the case of a will, or the delivery, where the instrument is an obligation — occurs, the instrument is of no legal significance. In the case of a will it requires the death of the party, and in that of a bond a delivery of the instrument, to indue it with any legal operation or effect. The existence of a will, duly executed and attested, at one period during a testator's lifetime, is a circumstance of no legal importance. He must die leaving such a will, or the case is one of intestacy. *Betts v. Jackson*, 6 Wend. 173-181. The provisions of a will made before the enactment of the Revised Statutes, and in entire conformity with the law as it then existed, but which took effect by the death of the testator afterwards, were held to be annulled by certain enactments of these statutes respecting future estates, notwithstanding the saving contained in the repealing act, to the effect that the repeal of any statutory provision shall not affect any act done, &c., previous to the time of the repeal. *De Peyster v. Clendining*, 8 Paige, 295; 2 R. S. p. 779, § 5;

Bishop v. Bishop, 4 Hill, 138. The Chancellor declared that the trusts and provisions of the will must depend upon the law as it was when it took effect by the death of the testator; and the Supreme Court affirmed that doctrine. There is no distinction, in principle, between general acts bearing upon testamentary provisions, like the statute of uses and trusts, and particular directions regarding the formalities to be observed in authenticating the instrument; and I do not doubt that all the wills executed under the former law, and which failed to conform to the new one, where the testator survived the enactment of the Revised Statutes; would have been avoided, but for the saving in the 70th section, by which the new statute was not to impair the validity of the execution of a will made before it took effect. 2 R. S. p. 68. If, as has been suggested, a will was a consummated and perfect transaction before the death of a testator, no change in the law subsequently made would affect it—the rule being, that what has been validly done and perfected respecting private rights under an existing statute is not affected by a repeal of the law. *Reg. v. The Inhabitants of Denton*, 14 Eng. L. & Eq. 124, per Lord Campbell, C. J.

If then a will legally executed under a law of this State, would be avoided by a subsequent change made in the law, before the testator's death, which should require different or additional formalities, it would seem that we could not give effect to one duly made in a foreign State or country, but which failed to conform to the laws of this State, where, at the time of its taking effect by the testator's death, he was no longer subject to the foreign law, but was fully under the influence of our own legal institutions. The question in each case is, whether there has been an act done and perfected under the law governing the transaction. If there has been, a subsequent change of residence would not impair the validity of the act. We should be bound to recognize it by the law of comity, just as we would recognize and give validity to a bond reserving eight per cent interest, executed in a State where that rate is allowed, or a transfer of property which was required to be under seal, but which had in fact been executed by adding a scroll to the signer's name in a State where that stood for a seal or the like. An act done in another State, in order to create rights which our courts ought to enforce on the ground of comity, must be of such a character that if done in this State, in conformity with our laws, it could not be constitutionally impaired by subsequent legislation. An executed transfer of property, real or personal, is a contract within the protection of the Constitution of the United States, and it creates rights of property which our own Constitution guarantees against legislative confiscation. Yet I presume no one would suppose that a law prescribing new qualifications to the right of devising or bequeathing real or personal property, or new regulations as to the manner of doing it, and making the law applicable in terms to all cases where wills had not already taken effect by the death of the testator, would be constitutionally objectionable.

I am of opinion that a will has never been considered, and that it is not by the law of this State, or the law of England, a perfected transaction, so as to create rights which the courts can recognize or enforce, until it has become operative by the death of the testator. As to all such acts which remain thus inchoate, they are in the nature of unexecuted intentions. The author of them may change his mind, or the State may determine that it is inexpedient to allow them to take effect, and require them to be done in another manner. If the law-making power may do this by an act operating upon wills already executed, in this State, it would seem reasonable that a general act, like the statute of wills, contained in the Revised Statutes, would apply itself to all wills thereafter to take effect by the death of the testator in this State, wherever they might be made; and that the law of comity, which has been spoken of, would not operate to give validity to a will executed in another State, but which had no legal effect there until after the testator, by coming to reside here, had fully subjected himself to our laws; nor then, until his testamentary act had taken effect by his death.

It may be that this conclusion would not, in all cases, conform to the expectations of testators. It is quite possible that a person coming here from another State, who had executed his will before his removal, according to the law of his former residence, might rely upon the validity of that act; and would die intestate, contrary to his intention, in consequence of our laws exacting additional formalities with which he was unacquainted. But it may be also that a well-informed man, coming here under the same circumstances, would omit to republish, according to our laws, his will, made at his former domicile, because he had concluded not to give legal effect, in this jurisdiction, to the views as to the disposition of his property which he entertained when it was executed. The only practical rule is, that every one must be supposed to know the law under which he lives, and conform his acts to it. This is the rule of law upon all other subjects, and I do not see any reason why it should not be in respect to the execution of wills.

In looking for precedents and juridical opinions upon such a question, we ought, before searching elsewhere, to resort to those of the country from which we derive our legal system, and to those furnished by the courts and jurists of our own country. It is only after we have exhausted these sources of instruction, without success, that we can profitably seek for light in the works of the jurists of the continent of Europe.

The principle adopted by the Surrogate is that, as to the formal requirements in the execution of a will, the law of the country where it was in fact signed and attested is to govern, provided the testator was then domiciled in such country, though he may have afterwards changed his domicile, and have been at his death a domiciled resident of a country whose laws required different formalities. Upon an attentive examination of the cases which have been adjudged in the English and American courts, I do not find anything to countenance this doctrine; but much

authority, of quite a different tendency. The result of the cases, I think, is, that the jurisdiction in which the instrument was signed and attested, is of no consequence, but that its validity must be determined according to the domicil of the testator at the time of his death. Thus, in *Grattan v. Appleton*, 3 Story's R. 755, the alleged testamentary papers were signed in Boston, where the assets were, and the testator died there, but he was domiciled in the British province of New Brunswick. The provincial statute required two attesting witnesses, but the alleged will was unattested. The court declared the papers invalid, Judge Story stating the rule to be firmly established, that the law of the testator's domicil was to govern in relation to his personal property, though the will might have been executed in another State or country where a different rule prevailed. The judge referred, approvingly, to *Desesbats v. Berquier*, 1 Bin. 336, decided as long ago as 1808. That was the case of a will executed in St. Domingo by a person domiciled there, and sought to be enforced in Pennsylvania, where the effects of the deceased were. It appeared not to have been executed according to the laws of St. Domingo, though it was conceded that it would have been a good will if executed by a citizen of Pennsylvania. The alleged will was held to be invalid. In the opinion delivered by Chief Justice Tilghman, the cases in the English ecclesiastical courts, and the authorities of the writers on the law of nations, were carefully examined. It was declared to be settled, that the succession to the personal estate of an intestate was to be regulated according to the law of the country in which he was a domiciliated inhabitant at the time of his death, and that the same rule prevailed with respect to last wills. I have referred to these cases from respectable courts in the United States, because their judgments are more familiar to the bar than the reports of the spiritual courts in England. But these decisions are fully sustained by a series of well-considered judgments of these courts. *De Bonneval v. De Bonneval*, 1 Curt. 856; *Curling v. Thornton*, 2 Addams, 6; *Stanley v. Bernes*, 3 Hag. 373; *Countess Ferraris v. Hertford*, 3 Curt. 468. It was for a time attempted to qualify the doctrine, in cases where the testator was a British subject who had taken up his residence and actual domicil in a foreign country, by the principle that it was legally impossible for one to abjure the country of his birth, and that therefore such a person could not change his domicil; but the judgment of the High Court of Delegates, in *Stanley v. Bernes*, finally put the question at rest. In that case an Englishman, domiciled in Portugal and resident in the Portuguese Island of Maderia, made a will and four codicils, all of which were executed according to the Portuguese law, except the two last codicils, and they were all executed so as to be valid wills by the law of England, if it governed the case. Letters were granted upon the will and two first codicils, but the other codicils were finally pronounced against. The Reporter's note expresses the result in these words: "If a testator (though a British subject) be domiciled abroad, he must conform, in his testamentary acts, to the

formalities required by the *lex domicilii*." See, also, *Somerville v. Somerville*, 5 Ves. 750; and *Price v. Dewhurst*, 8 Simons, 279, in the English Court of Chancery.

It is true that none of these decisions present the case of a change of domicile, after the signing and attesting of a will. They are, notwithstanding, fully in point, if I have taken a correct view of the nature and effect of a will during the lifetime of the testator. But the remarks of judges in deciding the cases, and the understanding of the Reporters clearly show, that it is the domicile of the testator at the time of his death which is to be considered in seeking for the law which is to determine the validity of the will. Thus, in *De Bonneval v. De Bonneval*, the question was upon the validity of the will executed in England, of a French nobleman who emigrated in 1792, and died in England in 1836. Sir Herbert Jenner states it to have been settled by the case of *Stanley v. Bernes*, that the law of the place of the domicile, and not the *lex loci rei sitæ*, governed "the distribution of, and succession, to personal property in testacy or intestacy." The Reporters' note is, that the validity of a will "is to be determined by the law of the country where the deceased was domiciled at his death."

Nothing is more clear than that it is the law of the country where the deceased was domiciled at the time of his death, which is to regulate the succession of his personalty in the case of intestacy. Judge Story says, that the universal doctrine now recognized by the common law, is, that the succession to personal property, *ab intestato*, is governed exclusively by the law of the actual domicile of the intestate at the time of his death. Conf. Laws, § 481. It would be plainly absurd to fix upon any prior domicile in another country. The one which attaches to him at the instant when the devolution of property takes place, is manifestly the only one which can have anything to do with the question. Sir Richard Pepper Arden, Master of the Rolls, declared, in *Somerville v. Somerville*, that the rule was that the succession to the personal estate of an intestate was to be regulated by the law of the country in which he was domiciled at the time of his death, without any regard whatever to the place of nativity, or the place where his actual death happened, or the local situation of his effects.

Now, if the legal rules which prevail in the country where the deceased was domiciled at his death are those which are to be resorted to in case of an intestacy, it would seem reasonable that the laws of the same country ought to determine whether in a given case there is an intestacy or not, and such we have seen was the view of Chief Justice Tilghman. Sir Lancelot Shadwell, Vice-Chancellor, in *Price v. Dewhurst*, also expressed the same view. He said, "I apprehend that it is now clearly established by a great variety of cases, which it is not necessary to go through in detail, that the rule of law is this: that when a person dies intestate, his personal estate is to be administered according to the law of the country in which he was domiciled at the time of his death, whether he was a British subject or not; and the

question whether he died intestate or not must be determined by the law of the same country." The method of arriving at a determination in the present case, according to this rule, is, to compare the evidence of the execution of his will with the requirements of the Revised Statutes. Such a comparison would show that the deceased did not leave a valid will, and consequently that he died intestate.

Being perfectly convinced that according to the principles of the common law, touching the nature of last wills, and according to the result of the cases in England and in this country which have been referred to, the will under consideration cannot be sustained, I have not thought it profitable to spend time in collecting the sense of the foreign jurists, many of whose opinions have been referred to and copiously extracted in the able opinion of the learned Surrogate, if I had convenient access to the necessary books, which is not the case. I understand it to be conceded that there is a diversity of opinion upon the point under consideration among these writers; but it is said that the authors who assert the doctrine on which I have been insisting, are not those of the highest character, and that their opinions have been criticised with success by M. Felix, himself a systematic writer of reputation on the conflict of laws. Judge Story, however, who has wrought in this mine of learning with a degree of intelligence and industry which has excited the admiration of English and American judges, has come to a different conclusion. His language is: "But it may be asked, what will be the effect of a change of domicile after a will or testament is made, of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicile at the time of his death? The terms in which the general rule is laid down would seem sufficiently to establish the principle that in such a case the will and testament is void; for it is the law of his actual domicile at the time of his death, and not the law of his domicile at the time of his making his will and testament of personal property, which is to govern." Section 473. He then quotes at length the language of John Voet to the same general effect. It must, however, be admitted that the examples put by that author, and quoted by Judge Story, relate to testamentary capacity as determined by age, and to the legal ability of the legatees to take, and not to the form of executing the instrument. And the Surrogate has shown, by an extract from the same author, that a will executed in one country according to the solemnities there required, is not to be broken solely by a change of domicile to a place whose laws demand other solemnities. Of the other jurists quoted by the Surrogate, several of them lay down rules diametrically opposite to those which confessedly prevail in this country and in England. Thus, Tollier, a writer on the civil law of France, declares that the form of testaments does not depend upon the law of the domicile of the testator, but upon the place where the instrument is in fact executed; and Felix, Malin, and Pothier are quoted as laying down the same principle. But nothing is more clear, upon the English and

American cases, than that the place of executing the will, if it is different from the testator's domicile, has nothing to do with determining the proper form of executing and attesting. In the case referred to from Story's Reports, the will was executed in Boston, but was held to be invalid because it was not attested as required by a provincial statute of New Brunswick, which was the place of the testator's domicile. If the present appeal was to be determined according to the civil law, I should desire to examine the authorities more fully than I have been able to do; but considering it to depend upon the law as administered in the English and American courts, and that according to the judgment of these tribunals it is the law of the domicile of the testator at the time of his death that is to govern, and not that of the place where the paper happened to be signed and attested, where that is different from his domicile at the time of his decease, I cannot doubt that the Surrogate and Supreme Court fell into an error in establishing the will. . . .

The will under immediate consideration was not, we think, legally executed; and the determination of the Surrogate and of the Supreme Court, which gave it effect, must be reversed.

COMSTOCK, C. J., LOTT, JAMES, and HOYT, JJ., concurred.

DAVIES, SELDEN, and MASON, JJ., dissented.

*Judgment reversed.*¹

ROBERTSON v. PICKRELL.

SUPREME COURT OF THE UNITED STATES. 1883.

[Reported 109 United States, 608.]

FIELD, J.² This was an action of ejectment for a parcel of land in the city of Washington, District of Columbia. On the trial the plaintiffs gave in evidence a conveyance of the premises from the United States to one Robert Moore, executed in June, 1800; and then endeavored to trace title from the grantee through a devise in his last will and testament, bearing date in July, 1803. For this purpose they produced and offered a transcript of proceedings in the Hustings Court of Petersburg, in the State of Virginia, containing a copy of the will and of its probate in that court in December, 1804.

By the law of Virginia then in force, that court was authorized to take the probate of wills, as well of real as of personal estate; and

¹ *Acc. Nat. v. Coons*, 10 Mo. 543 (*semble*). The general principle that the validity of a will of personalty depends upon the law of the domicile is well established. *Enohin v. Wylie*, 10 H. L. C. 1; *Macdonald v. Macdonald*, L. R. 14 Eq. 60; *Dessebats v. Berquier*, 1 Binn. 336. The validity of a bequest is judged by the same law. *Jones v. Habersham*, 107 U. S. 174; *Fellows v. Miner*, 119 Mass. 541; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Dammert v. Osburn*, 141 N. Y. 564, 35 N. E. 1088. — ED.

² Part of the opinion is omitted. — ED.

when a will was exhibited to be proved, it could proceed immediately to receive proofs, and to grant a certificate of its probate. Within seven years afterwards its validity was open to contestation in chancery by any person interested ; but, if not contested within that period, the probate was to be deemed conclusive, except as to parties laboring at the time under certain disabilities, who were to have a like period to contest its validity after the removal of their disabilities.

The transcript was offered not merely as an exemplified copy of the record of the last will and testament of Robert Moore, and of its probate in the Hustings Court, but also as conclusive proof of the validity of the will, and of all matters involved in its probate. Upon objection of the defendants' counsel, it was excluded, and an exception was taken to the exclusion. The ruling of the court constitutes the principal error assigned for a reversal of the judgment.

We think the ruling was correct. Looking at the transcript presented, we find that it shows only that a paper purporting to be the last will and testament of the deceased was admitted to record upon proof that the instrument and the signature to it were in his handwriting. No witnesses to its execution were called, no proof was offered of the genuineness of the signatures of the parties whose names are attached to it as witnesses, and no notice was given to parties interested of the proceedings in the Hustings Court. As a record it furnishes no proof of an instrument executed as a last will and testament in a form to pass real estate in the District of Columbia. The execution of such a will must be attested by at least three witnesses. It matters not how effective the instrument may be to pass real property in Virginia ; it must be executed in the manner prescribed by the law in force in the district to pass real property situated there, and its validity must be established in the manner required by that law. It is familiar doctrine that the law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos*. In most of the States in the Union a will of real property must be admitted to probate in some one of their courts before it can be received elsewhere as a conveyance of such property. But by the law of Maryland, which governs in the District of Columbia, wills, so far as real property is concerned, are not admitted to such probate. The common-law rule prevails on that subject. The Orphans' court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also ; but the probate is evidence of the validity of the will only so far as the personal property is concerned. As an instrument conveying real property the probate is not evidence of its execution. That must be shown by a production of the instrument itself and proof by the subscribing witnesses ; or, if they be not living, by proof of their handwriting.

So it matters not that the same effect is to be given in the courts of this district to the record of the Hustings Court, which, by the law of Virginia, can be given to it there ; that is, that it is to be received as

sufficient to pass the title to real property situated in that State. The question still remains — is the instrument sufficient to pass title to real property in the District of Columbia? If so, it should have been produced and proved in the manner mentioned. If, as stated by counsel, it is on file in the Hustings Court, and by the law of Virginia cannot be removed, then it should have been proved under a commission, as other instruments out of the State are proved, when it is impossible to compel their production in court.

The act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle, and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works v. Columbia College*, 17 Wall. 521, 529.

It does not appear that the validity of the will of Moore, as probated in 1804 in the Hustings Court of Petersburg, was ever afterwards contested in a Court of Chancery in Virginia. Its probate must, therefore, be deemed conclusive, so far as that State is concerned, and the will held sufficient to pass all property which can be there transferred by a valid instrument of that kind. But no greater effect can be given out of Virginia to the proceeding in the Hustings Court. The probate establishes nothing beyond the validity of the will there. It does not take the place of provisions necessary to its validity as a will of real property in other States, if they are wanting. Its validity as such will, in other States, depends on its execution in conformity with their laws; and if probate there be also required, such probate must be had before it can be received as evidence.

Authority for these views is found in the cases of *McCormack v. Sullivant*, 10 Wheat. 192, and of *Darby v. Mayer*, 10 Wheat. 465. In the first of them it appeared that by the law of Ohio, before a will devising real property can be considered as valid, it must be presented to the court of common pleas of the county where the land lies, for probate, and be proved by at least two of the subscribing witnesses, unless it has been proved and recorded in another State according to its laws; in which case an authenticated copy can be offered for probate without proof by the witnesses. A will devising real property in that State was admitted to probate in the State of Pennsylvania, and this court held that such probate gave no validity to the will in respect to the real property in Ohio, as to which the deceased was to be considered as having died intestate. *McCormack v. Sullivant*, 10 Wheat. at 202, 203. In the second case, which was an action of ejectment for land in Tennessee, the defendant endeavored to trace title to the premises through the will of one Kitts. For that purpose a copy and pro-

bate of the will devising the property were produced in evidence, certified from the Orphans' Court of Baltimore County, Maryland, and admitted against the objection of the plaintiff. This court held the record inadmissible, and in its opinion explained the common-law doctrine as to what was legal evidence in an action of ejectment to establish a devise of real property. It stated that the ordinary's probate was no evidence of the execution of the will in ejectment; that where the will itself was in existence and could be produced, it was necessary to produce it; and that when the will was lost or could not be produced, secondary evidence was necessarily resorted to; but that, whatever the proof, it was required to be made before the court which tried the cause, the proof before the ordinary being *ex parte*, the heir at law having no opportunity to cross-examine the witnesses, and the same solemnities not being required to admit the will to probate, which are indispensable to give it validity as a devise of real property. And the court added that the law of Maryland, with regard to the evidence of a devise in ejectment, was the common law of England, and had been so recognized in decisions of the courts of that State. *Darby v. Mayer*, 10 Wheat. at 468, 469.

The first of these cases shows that the probate of a will of real property in one State is of no force in establishing the validity of the will in another State. That must be determined by the laws of the State where the property is situated. The second case shows that the proof of a devise of land in ejectment in Maryland — and its law obtains in this district — must be made by the production of the will in court, and evidence of its execution by the subscribing witnesses; or, if the will be lost, or cannot be produced, the proof must be made by secondary evidence of its execution and contents.

The plaintiffs contend that they can use the record of the Hustings Court in Virginia as proof of the genuineness of the instrument, and then supplement that proof by parol evidence that the original was executed by three witnesses, and thus establish it as a will sufficient to pass real estate in the District of Columbia. But in this contention they overlook a material circumstance. It is not sufficient to give effect to an instrument as a will of real property that its genuineness merely be established. Its genuineness must be shown by the witnesses, if they are living, who attested its execution and heard the declaration of the testator as to its character, and, if dead, their handwriting must be proved, as already stated. No other proof will answer; certainly not the probate of the will on *ex parte* testimony by a tribunal of another State or country.¹

¹ The rule here laid down is of general application. The law of the situs of the land governs the methods of executing, proving, and recording a will, so far as it devises land. *Callaway v. Doe*, 1 Blackf. 372; *Keith v. Keith*, 97 Mo. 223, 10 S. W. 597; *Lapham v. Olney*, 5 R. I. 413. The same law governs the validity of the devise. *Hobson v. Hale*, 95 N. Y. 588; *Lewis v. Doerle*, 28 Ont. 412; the nature of the title conveyed: *Pratt v. Douglas*, 38 N. J. Eq. 516; the right of devising as against heirs:

CARPENTER v. BELL.

SUPREME COURT OF TENNESSEE. 1896.

[Reported 96 Tennessee, 294.]

BEARD, J. The will which is the subject of this litigation was executed by a *feme covert*, who was, at the date of its execution as well as at the time of her death, a resident of the State of Kentucky, and by it the testatrix undertakes to dispose of real property in this State. Notwithstanding all the formalities required by our statutes to validate such a will have been observed in this case, yet it is insisted that, as the law of Kentucky incapacitates a married woman from making a disposition of such property by last will and testament, this incapacity follows the instrument into this State and defeats the devise of realty located here. The bill in this cause is filed on this theory.

This contention is unsound, as is well settled by the authorities. As to immovable property, the rule is that the *lex rei sitæ* governs as to the capacity or incapacity of the testator, the extent of his power of disposition, and the forms and solemnities necessary to give the will its due authority and effect. Pritchard on Wills, § 53; Williams v. Saunders, 5 Cold. 60; Rorer on Int. Law, 288, note; Story on Con. of Laws, § 474; White v. Howard, 46 N. Y. 144; Ford v. Ford, 70 Wis. 19.

The result is, that the decree of the Chancellor dismissing complainant's bill will be affirmed with costs.¹

MAYOR, ALDERMEN, AND CITIZENS OF CANTERBURY
v. WYBURN.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1894.

[Reported [1895] Appeal Cases, 89.]

LORD HOBHOUSE.² On the 13th of June, 1891, J. G. Beaney, an inhabitant of Melbourne, and a domiciled Victorian, died, having by a codicil to his will bequeathed legacies to the appellants in the following terms:—

“I direct my said trustee to pay to the mayor and corporation of the said city of Canterbury for the time being the sum of ten thousand

Eyre v. Storer, 37 N. H. 114; the effect of the will upon after-acquired land: Frazier v. Boggs, 37 Fla. 307, 20 So. 245; Wynne v. Wynne, 23 Miss. 251.

In several States, by statute, a will good where made will pass land. Irwin's Appeal, 33 Conn. 128; Lyon v. Ogden, 85 Me. 374, 27 Atl. 258.

A chattel real is to be treated like land in this respect. Pepin v. Bruyère, [1900] 2 Ch. 504; De Fogassieras v. Duport, 11 L. R. Ir. 123. — Ed.

¹ Acc. Holman v. Hopkins, 27 Tex. 38. — Ed.

² The opinion only is given. — Ed.

pounds, for the purpose of their buying a suitable piece of ground at Canterbury aforesaid and erecting thereon with as little delay as possible a free library and reading-room for the working classes; such building when erected to be called 'The Beaney Institute for the Education of Working Men.' And I also bequeath to the said mayor and corporation of the said city of Canterbury all my medical diplomas and military commissions for the purpose of their being hung up and exhibited in the principal hall of the said building so to be erected as aforesaid."

By another codicil he bequeathed some more articles of a like kind in a like way. His residuary legatees are certain charitable institutions in Melbourne, of whom the respondents, the Melbourne Hospital, have been selected to defend the interests of all. They contend here that the gift of £10,000 to the appellants must fail by reason of the English statute law which restricts gifts to charitable uses.

The case was argued before A'Beckett, J., upon certain questions propounded for the court to answer; and by his answers that learned judge maintained the validity of the gifts, and directed the executors to comply with the directions of the testator. He finds that there is nothing in the law of Victoria to prevent such a testamentary gift. He adds:—

"If it had been shown that under the law as it stands in England the corporation of Canterbury could not lawfully spend £10,000 in buying land and erecting a building as contemplated by the testator, and therefore that the object of the testator could not lawfully be accomplished, I should not direct the executors to pay the legacy to the corporation. This has not been shown. It appears that the corporation could lawfully have expended £10,000 in this manner if the testator had sent the money to them in his lifetime, and that they will have the right to spend it in this manner if sent them by his executors as directed by his will."

The residuary legatees appealed, and the full court varied the decision of the first court by holding that the bequest of money was invalid, and, the residuary legatees consenting, that the bequests of chattels were valid. The reasons of the three learned judges are in substance identical. They consider that as the £10,000 is given for the purchase of land in England the case is the same as if the testator had actually devised land of his own in England, and they argue, justly enough, that nobody can so operate on English land.

From their order, holding the bequest of money invalid, the present appeal is brought; and their Lordships have to consider whether it is right. Of course, there is no doubt of the competency of the English legislature to forbid such gifts. The question is whether it has done so. It would seem that this is the first occasion on which such a question has come into court for decision.

It appears to their Lordships that the arguments relied on by the full court, and by the respondents' counsel at this bar, err in exaggerating

the amount of prohibition imposed by the English statutes, and in ascribing to it a more absolute effect than it really has. The Attorney-General indeed, in his argument for the residuary legatees, insisted on the title of the Act of 9 Geo. II. c. 36, passed in the year 1736: "An act to restrain the disposition of lands, whereby the same become unalienable." That title correctly expresses the object of the act; but it is manifest from the preamble and the operative parts of the act that it does not purport to restrain every such disposition, nor does the title say that it does. If there were an absolute prohibition of all gifts of land for charitable uses, Mr. Beaney's gift could not take effect. But as in fact the English statutes leave all persons as free as they were by common law to give or to receive any amount of land for those purposes, provided only that they observe the positive rules prescribed for them, the question in each case is whether the mode of acquiring land is a lawful or a forbidden one.

The statute which now governs this question was passed in the year 1888 (51 & 52 Vict. c. 42), and according to a recent practice, it has no preamble to give the key to its policy. But it is mainly an act of consolidation; if it effects any alteration in the previous law, the difference does not concern the question now to be decided; and it must be taken that its provisions rest upon precisely the same policy as those of the statute 9 Geo. II. c. 36.

The preamble of that statute refers to the older statutes passed to restrain the mischiefs of gifts in mortmain. Then it proceeds: "Nevertheless this publick mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherision of their lawful heirs; for remedy whereof be it enacted." This, then, was the mischief which the legislature desired to abate: the increase of land held in mortmain by gifts which may for brevity, and somewhat loosely, be termed death-bed gifts. The mode taken to restrain this mischief was to enact that no land, nor any money to be laid out in the purchase of land, should be given to any person for the benefit of any charitable use, unless the gift be made by deed executed twelve calendar months at least before the death of the donor, and enrolled in Chancery within six calendar months of its execution, and unless the gift be made to take immediate effect. Another section extends the prohibition to charges affecting land, which is a large class — at that date a much larger relative class than now — of personal estate; and it declares that the prohibited gifts shall be absolutely null and void. Therefore, in all cases of wills to which the statute applies, such gifts are prohibited by its express terms.

It is expressly enacted that the statute shall not extend to the grant of any estate in Scotland. After a time came the question whether it extends to the Colonies, and that question was settled in the negative in the case of *Attorney-General v. Stewart*, 2 Mer. 143, decided by Sir

William Grant in the year 1817. He considered that both the mischief struck at by the act, and the methods prescribed for lawful gifts, were of a local character peculiar to England. Therefore, he held that the act did not extend to Grenada, though it is in general terms, and though the laws of England had been extended in general terms to the island when first ceded in 1763, and again when recovered in 1784. That opinion has ever since prevailed, and in the case of the Gilchrist foundation, *Whicker v. Hume*, 7 H. L. Rep., 124, it was applied to a gift of land in New South Wales.

In that state of the law the present act of 1888 was passed. By sect. 4, sub-sect. 1, it is enacted thus:—

“Subject to the savings and exceptions contained in this act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this act, and unless so made shall be void.”

The requirements of the act are substantially those of the act of 1786. If the assurance is of personal estate not being stock in the public funds, it must be made by deed enrolled within six months of the execution, and, if it is not made for full valuable consideration, executed twelve months before the death of the assurers. By the interpretation clause the term “assurance” includes a will. This act therefore, subject to some special exemptions, prohibits “death-bed” gifts as strictly as does the earlier act. But it is impossible to suppose that the English legislature intended to affect a will subject to the law of Victoria. All the reasons against such a construction which were applied to the earlier enactment apply to the later one. It is expressly declared that the act does not extend to Scotland or Ireland. To declare that a bequest made by a colonial will shall be void on the ground that it contravenes the local law of England may not be beyond the competence of the Imperial Parliament, but is quite beyond its ordinary scope, and such an intention ought not to be imputed to it without very clear grounds. Seeing, indeed, that the repealed and consolidated statutes did not apply to the Colonies, and that Scotland and Ireland are expressly excepted from the new statute, it is impossible without express words to suppose that there was any intention of affecting the Colonies by the new statute. Moreover, Sir Wm. Grant’s other reasons apply exactly to the present question. It cannot have been intended that methods of a local character prescribed for making a lawful gift should be adopted in a distant colony, or, if not, that the gift should be invalid.

Indeed, the case for the residuary legatees is not rested on any such broad ground as this. The courts below are agreed that the Victorian testator is quite free to make such a gift as he has made; nor has the contrary been contended here. But for that conclusion the word “assurance” in the act must receive the qualification that it means something which is governed by English law.

Of course it is a different thing to say that English law must decide whether English land can be bought with money coming from such a source as a foreign will; and that, if it decides in the negative, the bequest must fail, not because it is illegal, but because it is impossible of execution. The Attorney-General stated broadly that the prohibitions of the Statutes of Mortmain are an integral part of the English law of real property. So they are; but the question is, how far they operate. The suggestion is that they operate to invalidate gifts of money coupled with an obligation to lay them out in land, if they have their origin in a will, though a perfectly valid will. Their Lordships cannot find such a prohibition in the act. They have reached the conclusion that this will is not invalidated by sub-sect. 1. At what point, then, of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their Lordships' view the English law will operate whenever a purchase of land for the charitable uses is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees, by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law. It is a valid will binding on his executors; and a Victorian court of justice should direct them to perform their obligation.

It has been contended very earnestly that the point is settled by the decision in *Attorney-General v. Mill*, 2 Dow & Cl. 393. In that case the testator was a native of Montrose. He spent many years in the island of Carriacou, where he owned land and amassed a large fortune. He returned to Montrose, and stayed there about five years. Then he came to England, and resided first in London and afterwards in Bath, up to his death in 1805, fourteen years afterwards. In 1791 he executed a will and a deed, by which he gave money to be invested in the purchase of land, ordering the income to be paid to certain Scottish trustees for the benefit of indigent ladies in Montrose. His will, with four codicils, all in English form, was proved in England. In his will and contemporaneous deed he described himself as of the island of Carriacou, now residing in Marylebone. His codicils, it was stated at the bar, contained similar descriptions. His foreign assets were transmitted to England, and were administered under the direction of the Court of Chancery and were the subject of a decree which paid no regard to the charitable gift. Subsequently an information was filed by the Attorney-General for the establishment of the charity by purchase of land in Scotland. It was held by Lord Lyndhurst, first in Chancery, and afterwards in the House of Lords, that the testator must be taken to have directed the purchase of land in England, and that his gift contravened the mortmain laws and was void.

It is now argued that the testator was a domiciled Scotsman, and that the case decides that a bequest of money in a Scottish will directing the purchase of land in England for a charity is a void bequest. But the assumption that the testator had a Scottish domicile is not warranted by anything to be found in the reports. In the meagre history of his life there is much to suggest arguments for an English domicile, and the counsel for the Attorney-General who was contending for the validity of the gift did not suggest any other domicile. The word "domicil" occurs only twice in the reports of the case. In one of them, 2 Dow & Cl. 394, the reporter uses a casual expression to the effect that on leaving Cariacou the testator resumed his domicile in Montrose; an expression which Lord St. Leonards, writing many years afterwards, repeated. But the Scottish origin of the testator, and his connection with Montrose, were only used as arguments to show that he contemplated the purchase of land in Scotland—a conclusion which one of the reasons appended to the appellant's case urged the House to adopt "even if he were domiciled in England." For some reason, doubtless a sufficient one, it was the common ground of argument that the will was governed from first to last by English law. There is not a trace in the reported statements, arguments, or judgments that anybody asked what would be the effect of a will not governed by English law, which is the question now propounded to their Lordships.

It is true that Story, J. (*Conflict of Laws*, § 446), and Mr. Westlake (*Private International Law*, § 165) both treat the decision as covering the case of a foreign will. But on examining the case that appears to their Lordships to be a misapprehension of the point really decided. So far as they know, the present question is wholly untouched by authority.

The Attorney-General dwelt on the amount of land which might be brought into mortmain if such bequests as these were allowed to take effect. Such considerations can hardly influence the construction of a statute except so far as they may appear to have been present to the minds of its framers. Their Lordships can hardly suppose that any one would feel alarm at the idea of foreigners giving large sums of money to English purposes; and if it be true that this is the first case of its kind to come into court, the experience of a century and a half tends to prove the futility of any such alarm. But, however that may be, their Lordships must construe the words of the statute according to their plain meaning, and leave it to the legislature to enact further prohibitions, if found expedient.

The result is that their Lordships will humbly advise Her Majesty to discharge the order of the full court, except so far as it deals with the specific chattels and with costs. This will in effect restore the judgment of Mr. Justice A'Beckett. It has seemed right to both the courts below that the costs of all parties to the litigation should be paid out of the testator's estate, those of the plaintiffs, who are the executors, being taxed as between solicitor and client. Their Lordships

have been asked to follow the same course in disposing of the costs of this appeal; and the residuary legatees raise no objection. Their Lordships will order accordingly.¹

IN RE PIERCY.

CHANCERY DIVISION. 1894.

[Reported [1895] 1 *Chancery*, 83.]

BENJAMIN PIERCY by his will, dated December 5, 1883, devised and bequeathed all his real and personal estate wheresoever to trustees to sell and convert into money all such estates, to invest the proceeds in English securities or land, and to apply the income for the benefit of persons named, and for charity.

An order for administration was made, which, among other things, directed "an inquiry what was the testator's estate and interest in lands situate elsewhere than in England, and whether such estates passed by the testator's will and were validly devised on the trusts thereof, and, if not, who are entitled to such lands, and for what estates and interests."

The testator was the absolute owner of a large extent of land in Sardinia. The opinions of a number of Italian advocates were taken as to the validity and effect under Italian law of the devise contained in the will as regarded land in Italy.

The following provisions of the Italian Civil Code were the most material:

"i. Preliminary directions as to the interpretation and application of the law in general.

"Art. 8. Successions by law or under testamentary disposition, whether as regards the order of succession, or as to the measure of the rights of succession, or the intrinsic validity of the disposition, are regulated by the national law of the person whose estate is in question, whatever may be the nature of the property, or in whatever country it may be situated.

"Art. 9. . . . The substance and effect of testamentary dispositions are regulated by the national law of the persons making them. . . .

"Art. 12. Notwithstanding the provisions of the preceding articles, in no case shall the laws, acts, or judgments of a foreign country, nor private dispositions or agreements, derogate from the prohibitive laws of the kingdom concerning either the persons, the property, or the acts; nor from the laws in any way concerning public order and morality (*il buon costume*).

¹ Acc. *Crum v. Bliss*, 47 Conn. 592; *Healey v. Reed*, 153 Mass. 197, 26 N. E. 404. — Ed.

"ii. Civil Code.

"Art. 899. Any condition imposed upon an heir or legatee, no matter how expressed, that he is to retain the property, and hand it over to a third party, is a trust substitution. Such substitution is forbidden.

"Art. 900. The invalidity of the trust substitution does not affect the validity of the institution of the heir or legatee to which it is attached; but it invalidates all the substitutions, even those of the first degree."

This code came into operation in 1866, and made very considerable changes in the laws of Italy previously in force as to land.

In 1889 the executors mortgaged a part of the testator's land in Sardinia to an Italian bank for £20,000. They afterwards sold other portions of the land. Proceedings were also taken in the Italian court with reference to the registration of the testator's property in Italy, for the purpose of ascertaining the duty to be paid thereon according to Italian law.

At the time when this summons was heard, the testator's brother and sister were both dead.¹

NORTH, J. (after stating the provisions of the will, as to which he said no difficulty could arise with respect to the testator's English property, or property which was to be dealt with according to English law, referred to some of the clauses of the Italian Code and the opinions of the Italian advocates and to the facts, and continued):

The question is, What is the position of matters as regards the real estate in Sardinia? It is not necessary for me to decide the question whether, under Italian law, the trustees take "as heirs," or whether the testator's children and brother and sister take "as heirs," because *quâcunque viâ* the will is good. If the trustees take as heirs, then everything beyond is "trust substitution," which would not be good according to Italian law, but the gift to the heirs would stand. If, on the other hand, as I think, the trustees are not the heirs, but the testator's children and brother and sister are the heirs, then, in my judgment, according to the preponderating weight of opinion, coupled with the evidence derived from what has actually taken place, the trustees have, according to Italian law, a clear power to sell the testator's real estate in Sardinia without any interference on the part of the persons beneficially interested in it. Therefore the direction given by the will to the trustees to sell the estate is perfectly good according to Italian law.

Then the next question is as to the application of the proceeds of sale. With respect to that, in my opinion, the will is perfectly good, because the application of the proceeds is not in any way inconsistent with the Italian law. The Italian law relates to the land; it determines how the land is to go, and regulates the rights of the various persons interested in it. When an absolute sale has taken place, the

¹ The statement of facts is condensed from that of the Reporter, and arguments of counsel are omitted. — Ed.

Italian law still applies to the land in the hands of the then owner or owners; but it has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will by a disposition which is valid according to Italian law.

Then, as regards the proceeds of sale, is there anything in Italian law which renders it illegal for the testator to do what he has done? The testator has directed that the proceeds of the sale of the land — that is, money to be obtained by the English trustees — is to be received by them, to be invested upon English securities, and then to be held by the trustees upon the trusts declared by an English will in favor of English beneficiaries. No one suggests that there is anything in Italian law forbidding this. It is, indeed, said by one of the Italian advocates that the land is the “patrimony,” and that, when the land is sold, the proceeds of sale — the money — is still the “patrimony.” What is the law as to that? It depends altogether upon the person to whom the money belongs. No doubt, if the money belongs to an owner who is subject to Italian law, whatever the Italian law forbids as to trusts must be observed, and if any person owning this property is subject to Italian law, and attempts to create a trust which the Italian law forbids, then, according to Italian law, the trust would be void. But when there is an English owner of money arising from the sale of land which belongs to other persons, and is subject in their hands to Italian law, there is nothing in Italian law to make that money itself subject to Italian law; and therefore, in my opinion, the proceeds of sale, when received by the trustees in pursuance of the valid exercise of the power of sale which they have according to the Italian law, pass entirely by the testator’s will, because the disposition is good according to English law, and is in no way at variance with Italian law, — meaning now by “Italian law” not merely anything which is expressed in the Italian Code, but anything contrary to “good custom” (whatever that may mean), — for the Italian law does not profess to regulate the disposition of English securities passing under the will of an Englishman to English legatees. In my opinion, therefore, the trust for sale being valid, the application of the proceeds of sale directed by the will is valid also.

Then the only question remaining is this. The trust has not yet been entirely executed, and at the present moment a part of the testator’s Italian land remains unsold, and is, therefore, subject to the law of Italy. The enjoyment of that land in the meantime, until it has been sold, is not in any way affected by the trust for sale, which has not yet been executed. We must look, therefore, to the Italian law to say what is the right to enjoy the land in the meantime, before the sale has actually taken place. I will take, first, the case of the testator’s widow. It seems to me clear that, according to Italian law, she is a “usufructuary,” in the sense that the disposition in her favor for life is perfectly good, and that the gift to the testator’s children and brother and sister, subject to that usufruct, is a good disposition.

Then comes the question of the "trust substitution"; and as to that, I come to the conclusion upon the evidence that the property is unconverted during that limited period. The Italian law applying, there can be no "trust substitution," and, that being so, the attempt to settle the shares on the children and the brother is not valid. As regards the sister, there is no question, because she takes absolutely in any case. As regards the children, to the extent of one moiety of their shares, and the brother as to the whole of his share, there is an attempt to settle. With the exception of the heir at law, Robert Charles Piercy, and the brother (who is dead), none of these persons raise any question. According to the Italian law they take absolutely, and the trusts over are ineffectual; but with those two exceptions they all say, "We wish to give effect to the testator's will in this respect; we are desirous that the income of the property until conversion shall, so far as our interests go, be applied in the same way as our shares of the income to arise from the proceeds of the conversion directed by the will will go after the conversion has taken place." There is nothing, in my view, contrary to Italian law in their saying that they wish their shares of the income of the unsold land to be applied in the same way as if they were shares of the income arising from the proceeds of sale after the conversion had taken place. The heir at law, however, does not elect or waive any right which he may have, and it is unnecessary for me to decide anything as to his share at present. So long as he lives, and the land remains unsold, he will, of course, be entitled to receive the income of his share, whether the trusts in favor of his children are good or bad, and no question between him and his children, or any other person, can possibly arise. It may be that all the land will be sold during his lifetime, and the question will never arise as between him and his children. But it is possible that he may die while part of the land remains unsold, and the question may then arise between him and his children. Any directions, therefore, which I now give must be without prejudice to any question between Robert Charles Piercy on the one hand, and, on the other hand, any person who may claim upon his death to be entitled to his one-eleventh of the income to arise from any part of the Italian property then remaining unsold, until the conversion thereof.

The question as to the brother's share of the income of the unsold land must be left open in the same way; as he has died recently, and although his representatives are before the court, and bound by my decision on the main questions, they are not prepared to consider or discuss this subordinate question at present; and possibly it may never be raised.¹

¹ *Acc. Ford v. Ford*, 80 Mich. 42; *Jenkins v. G. T. & S. D. Co.*, 53 N. J. Eq. 194, 32 Atl. 208; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413; *Ford v. Ford*, 70 Wis. 19.

So of a bequest to be sent into another State and there held in trust. *Sickles v. New Orleans*, 80 Fed. 868; *Vansant v. Roberts*, 3 Md. 119; *Chamberlain v. Chamberlain*, 43 N. Y. 424. — Ed.

CHAPTER IX.

OBLIGATIONS EX DELICTO.

PHILLIPS v. EYRE.

EXCHEQUER CHAMBER. 1870.

[*Reported Law Reports, 6 Queen's Bench, 1.*]

WILLES, J.¹ This is an action complaining of false imprisonment and other injuries to the plaintiff by the defendant in the island of Jamaica. The plea states in effect that the defendant was governor of the island; that a rebellion broke out there which the governor and others acting under his authority had arrested by force of arms; that an act was afterwards duly passed by the legislature of the island, and received the royal assent, by which, after reciting the rebellion, a proclamation of martial law within certain local limits by the governor with the advice of a council of war; that the rebellion had been suppressed and imminent general sacrifice of life thereby averted; that the military, naval, or civil authorities might, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion; and that all persons who in good faith and royal resolve had acted for the crushing of the rebellious outbreak ought to be indemnified and kept harmless for such their acts of loyalty, — it was enacted by the governor, legislative council, and assembly of the island, amongst other things, that the defendant and all officers and other persons who had acted under his authority, or had acted *bona fide* for the purpose and during the existence of martial law, whether done in any district in which martial law was proclaimed or not, were thereby indemnified in respect of all acts, matters, and things done in order to put an end to the rebellion, and all such acts were “thereby made and declared lawful, and were confirmed.” The plea further states that the grievances complained of in this action were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to, and *bona fide* done in order to put an end to, the rebellion, and so were included in the indemnity. To this plea the plaintiff demurred, and also replied that the defendant as governor was, by the

¹ Part of the opinion is omitted. — Ed.

law of Jamaica, a necessary party to the making of the act. The defendant demurred to that replication, and issues in law were raised upon the validity of the plea and replication, upon which issues the Court of Queen's Bench gave judgment for the defendant, whereupon the plaintiff has assigned error. . . .

The last objection to the plea of the colonial act was of a more technical character; that assuming the colonial act to be valid in Jamaica and a defence there, it could not have the extraterritorial effect of taking away the right of action in an English court. This objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. "*Quæ accessorium locum obtinent extinguuntur cum principales res peremptæ sunt.*" A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject-matter may show that the parties intended their bargain to be governed by some other law; but, *prima facie*, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong.

Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land: *Doulson v. Matthews*, 4 T. R. 503; and even with respect to those not falling within that description our courts do not undertake universal jurisdiction. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character, that it would have been actionable if committed in England; therefore, in *The Halley*, Law Rep. 2 P. C. 193, the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore,

in *Blad's Case*, 3 Swan. 603, and *Blad v. Bamfield*, 3 Swan. 604, Lord Nottingham held that a seizure in Iceland, authorized by the Danish Government and valid by the law of the place, could not be questioned by civil action in England, although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark—a matter proper for remonstrance, not litigation. And in *Dobree v. Napier*, 2 Bing. N. C. 781, Admiral Napier having, when in the service of the Queen of Portugal, captured in Portuguese water an English ship breaking blockade, was held by the Court of Common Pleas to be justified, by the law of Portugal and of nations, though his serving under a foreign prince was contrary to English law, and subjected him to penalties under the Foreign Enlistment Act. And in *Reg. v. Lesley*, Bell C. C. 220; 29 L. J. (M. C.) 97, an imprisonment in Chili on board a British ship lawful there, was held by Erle, C. J., and the Court for Crown Cases Reserved, to be no ground for an indictment here, there being no independent law of this country making the act wrongful or criminal. As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature. This distinction is well illustrated on the one hand by *Huber v. Steiner*, 2 Bing. N. C. 202, where the French law of five years' prescription was held by the Court of Common Pleas to be no answer in this country to an action upon a French promissory note, because that law dealt only with procedure, and the time and manner of suit (*tempus et modum actionis instituendæ*), and did not affect to destroy the obligation of the contract (*valorem contractus*); and on the other hand by *Potter v. Brown*, 5 East, 124, where the drawer of a bill at Baltimore upon England was held discharged from his liability for the non-acceptance of the bill here by a certificate in bankruptcy, under the law of the United States of America, the Court of Queen's Bench adopting the general rule laid down by Lord Mansfield in *Balantine v. Golding*, *Cooke's Bankrupt Law*, 487, and ever since recognized that "what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere." So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation, *ex delicto*, to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided. Cases may possibly arise in which distinct and independent rights or liabilities or defences are created by positive and specific laws of this country in respect of foreign transactions; but

there is no such law (unless it be the Governors Act already discussed and disposed of) applicable to the present case.

It may be proper to remark, before quitting this part of the subject, that the colonial act could not be overruled upon either of these two latter grounds of objection without laying down that no foreign legislation could avail to take away civil liability here in respect of acts done abroad; so that, for instance, if a foreign country after a rebellion or civil war were to pass a general act of oblivion and indemnity, burying in one grave all legal memory alike of the hostilities, and even the private retaliations which are the sure results of anarchy and violence, it would, if the argument for the plaintiff prevailed, be competent for a municipal court of any other country to condemn and disregard, as naturally unjust or technically ineffectual, the law of a sovereign State, disposing, upon the same constitutional principles as have actuated our own legislature, of matters arising within its territory — a course which to adopt would be an unprecedented and mischievous violation of the comity of nations.

We have thus discussed the validity of the defence upon the only question argued by counsel, touching the effect of the colonial act, but we are not to be understood as thereby intimating any opinion that the plea might not be sustained upon more general grounds as showing that the acts complained of were incident to the enforcement of martial law. It is, however, unnecessary to discuss this further question, because we are of opinion with the court below that the colonial Act of Indemnity, even upon the assumption that the acts complained of were originally actionable, furnishes an answer to the action.

The judgment of the Court of Queen's Bench for the defendant was right, and is affirmed.

Judgment affirmed.

MACHADO v. FONTES.

COURT OF APPEAL. 1897.

[Reported [1897] 2 Queen's Bench, 231.]

APPEAL from KENNEDY, J., at chambers.

The plaintiff brought this action to recover damages from the defendant for an alleged libel upon the plaintiff contained in a pamphlet in the Portuguese language alleged to have been published by the defendant in Brazil.

The defendant delivered a statement of defence (in which, amongst other defences, he denied the alleged libel), and he afterwards took out a summons for leave to amend his defence by adding the following plea: "Further the defendant will contend that if (contrary to the defendant's contention) the said pamphlet has been published in Brazil, by the Brazilian law the publication of the said pamphlet in Brazil

cannot be the ground of legal proceedings against the defendant in Brazil in which damages can be recovered, or (alternatively) cannot be the ground of legal proceedings against the defendant in Brazil in which the plaintiff can recover general damages for any injury to his credit, character, or feelings."

The summons came before KENNEDY, J., in chambers, who allowed the plea to be added, but expressed some doubt as to the propriety of so doing, and gave leave to plaintiff to bring the present appeal.¹

LOPES, L. J. I am of opinion that this appeal ought to be allowed. [The Lord Justice then referred to the facts, and, after reading the plea, continued:]

Now that plea, as it stands, appears to me merely to go to the remedy. It says, in effect, that in this case no action in which damages could be recovered would lie in Brazil, and, assuming that any damages could be recovered in Brazil, they would be special damages only. Mr. Walton contends that that is not the meaning of the plea; that the plea is intended to raise a larger question than that, and to say that libel cannot be made the subject of any civil proceedings at all in Brazil, but is only the subject-matter of criminal proceedings; and, for the purposes of what I am about to say, I will assume that to be so.

Now the principle applicable in the present case appears to me to be this: where the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful — I use the word "wrongful" deliberately — both by the law of this country and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with.

In the case of *Phillips v. Eyre*, L. R. 6 Q. B. 1, Willes, J., lays down very distinctly what the requisites are in order to found such an action. He says this (at p. 28): "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done." Then in *The M. Moxham*, 1 P. D. 107, James, L. J., in the course of his judgment, uses these words (at p. 111): "It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this court will take into consideration that state of the law, — that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here."

Both those cases seem to me to go this length: that, in order to constitute a good defence to an action brought in this country in re-

¹ Arguments of counsel are omitted. — ED.

spect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed. In the present case there can be no doubt that the action lies, for it complies with both of the requirements which are laid down by Willes, J. The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed. Both those conditions are complied with; and, therefore, the publication in Brazil is actionable here.

It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue.

Therefore, in this case, in my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country.

It is contended that it would be much better that this question should not be decided at the present time, but that a commission should go to Brazil, and that the Brazilian law should be inquired into. If our view is correct, it seems to me that that would be a great waste of time and money, because, having regard to the authorities I have mentioned, this plea is absolutely bad, and ought to be struck out.

RIGBY, L. J. I am of the same opinion. I do not propose to decide this case on any technical consideration as to what may be the precise meaning of the allegation that is proposed to be introduced into the defence; I give it the widest possible construction it can reasonably bear; and I will assume it to involve that no action for damages, or even no civil action at all, can be maintained in Brazil in respect of a libel published there. But it does not follow from that that the libel is not actionable in this country under the present conditions, and having regard to the fact that the plaintiff and defendant are here.

Willes, J., in *Phillips v. Eyre*, was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule to "justifiable" in the second branch of it was deliberate. The first requisite is that the wrong must be of such a character that it would be actionable in England. It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shown by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocence of the act in the foreign country is an answer to the action. That is what

is meant when it is said that the act must be "justifiable" by the law of the place where it was done.

It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be.

The remedy must be according to the law of the country which entertains the action. Of course, the plea means that no action can be brought in this country in respect of the libel (if any) in Brazil. But I think the rule is clear. It was very carefully laid down by Willes, J., in *Phillips v. Eyre*; and in the case of *The M. Moxham*, all the learned judges of the Court of Appeal in their judgments laid down the law without hesitation and in a uniform manner: and first one judge and then another gave, in different language but exactly to the same purport and effect, the rule enunciated by Willes, J. So that if authority were wanting there is a decision clearly binding upon us, although I think the principle is sufficient to decide the case.

I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shown to be justified or excused in the country where it was published. James, L. J., states, in *The M. Moxham*, what the settled law is. Mellish, L. J., is quite as clear upon that point as James, L. J., in laying down the general rule; and Baggallay, L. J., also takes the same view. We start, then, from this: that the act in question is *prima facie* actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give. Here we cannot see it, and this appeal must be allowed with costs.

*Appeal allowed.*¹

¹ In *Scott v. Seymour*, 1 H. & C. 219, 234, in the Exchequer Chamber, WIGHTMAN, J., said *obiter*: "I am not aware of any rule of law which would disable a British subject from maintaining an action in this country for damages against another British subject for an assault and battery committed by him in a foreign country, merely because no damages for such trespasses were recoverable by the law of the foreign country, and without any allegation that such trespasses were lawful or justifiable in that country. By the law of England, an action to recover damages for an assault and battery is transitory, and whatever might be the case as between two Neapolitan subjects, or between a Neapolitan and an Englishman, I find no authority for holding that, even if the Neapolitan law gives no remedy for an assault and battery, however violent and unprovoked, by recovery of damages, that therefore a British subject is deprived of his right to damages given by the English law against another British subject." BLACKBURN, J., said: "If, indeed, the plea had averred that by the law of Naples no damages are recoverable for an assault however violent, that would have raised a question upon which I have not at present made up my mind. I doubt whether it would be a good bar but, supposing it would, I am disposed to think that the fact of the parties being British subjects would make no difference. As at present advised, I think that when two British subjects go into a foreign country, they owe local allegiance to the law of that country, and are as much governed by that law as foreigners." WILLIAMS, J., said, as to the dictum of WIGHTMAN, "as at present advised, I am not prepared to assent to it." The other judges declined to express an opinion on the point. — ED.

LE FOREST v. TOLMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1875.

[Reported, 117 *Massachusetts*, 109.]

GRAY, C. J. In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought. *Smith v. Condry*, 1 How. 28; s. c. 17 Pet. 20; *The China*, 7 Wall. 53, 64; *Blad's Case*, 3 Swanst. 603; *Blad v. Bamfield*, 3 Swanst. 604; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239, and L. R. 6 Q. B. 1; *The Halley*, L. R. 2 Adm. 3, and L. R. 2 P. C. 193; *Stout v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*, 5 Ired. 177; *Mahler v. Norwich & New York Transportation Co.*, 35 N. Y. 352; *Needham v. Grand Trunk Railway*, 38 Vt. 294; *Richardson v. New York Central Railroad*, 98 Mass. 85.

In the case at bar, the injury sued for was done to the plaintiff in New Hampshire by a dog owned and kept by the defendant in Massachusetts. Such an action could not be maintained at common law, without proof that the defendant knew that his dog was accustomed to attack and bite mankind. *Popplewell v. Pierce*, 10 Cush. 509; *Pressed v. Wirth*, 3 Allen, 191. No evidence of such knowledge, or of the law of New Hampshire, was introduced at the trial. Nor is it contended that the defendant would be liable to any action or indictment by the laws of that State.

The plaintiff relies upon the statute of this Commonwealth, which provides that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort." Gen. Sts. c. 88, § 59. This statute is not a penal, but a remedial statute, giving all the damages to the person injured. *Mitchell v. Clapp*, 12 Cush. 278. It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person, the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog for which the master is responsible.

The defendant having done no wrongful act in this Commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of action or indictment by the laws of that State, this action cannot be maintained.

*Exceptions sustained.*¹

¹ *Acc. The Lamington*, 87 Fed. 752; *Carter v. Goode*, 50 Ark. 155, 6 S. W. 719; *Whitford v. Panama R. R.*, 23 N. Y. 465; *Holland v. Pack, Peck*, 151; *McLeod v. R. R.*, 58 Vt. 727; 16 *Clunet*, 664 (French Cass. 16 May, '88). — Ed.

DAVIS v. NEW YORK AND NEW ENGLAND RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1887.

[Reported 143 *Massachusetts*, 301.]

DEVENS, J. The defendant is a railroad corporation, operating a railroad through Massachusetts and Connecticut, as a continuous line, by virtue of the St. of 1873, c. 289, and exists as a corporation by the laws of each of these States. This action is brought by the plaintiff, as administrator of the estate of Mrs. Ruth L. Brown, for alleged injury to her, which finally resulted in her death, by reason of the carelessness of the defendant and that of its servants, while she was being conveyed as a passenger over its railroad in Connecticut, the intestate being herself at the time in the exercise of due care.

The law of the State of Connecticut has been properly determined as a fact by the judge presiding at the trial, and his finding in regard to it is conclusive. *Ames v. McCamber*, 124 Mass. 85, 91. From this it appears "that, by the common law in Connecticut, an action for personal injuries does not survive to the administrator of the person injured; that there is no statute or law in Connecticut by virtue of which a common-law action for personal injuries is revived, or made to survive to an administrator of the person injured." The facts, as they are alleged, "do not constitute a cause of action under the laws of the State of Connecticut by the administrator in behalf of the intestate's estate, and this action could not be maintained in that State, if duly brought by an administrator there." The administrator may there maintain, upon these facts, a special action, penal in its nature, created by the statutes of Connecticut, by which the damages recoverable are limited to not more than \$5,000, and under which the damages recovered do not become assets of the estate, but are recovered in behalf of certain persons not thus entitled to the same according to the laws of distribution, and are to be paid over in specified proportions to them.

The plaintiff does not contend that he may maintain this action as the special one provided by the statute of Connecticut, nor under the laws of that State. *Richardson v. New York Central Railroad*, 98 Mass. 85. We are aware that the correctness of this decision has been called in question by the Supreme Court of the United States in *Dennick v. Railroad*, 103 U. S. 11; but it is unnecessary to reconsider our own decision, as the plaintiff seeks only to maintain his action under our statute, which provides that, in case of damage to the person, the action shall survive, and may thus be prosecuted by an administrator. Pub. Sta. c. 165, § 1; *Hollenbeck v. Berkshire Railroad*, 9 Cush. 478. The inquiry is therefore presented, whether a cause of action at common law, which dies with the person in the State where it accrued, not having been made there to survive by any statute, will survive under and by

virtue of the statutes of survivorship of another State, so that, if jurisdiction is there obtained over the person or property of the defendant, judgment may properly be rendered against him or his property. That our statute would furnish a remedy, where the cause of action was one recognized by the law of this State as the foundation of an action at common law, although it accrued without the State, it being there recognized as existing, and not discharged or extinguished, will be conceded.

It must certainly be the right of each State to determine by its laws under what circumstances an injury to the person will afford a cause of action. If this is not so, a person who is not a citizen of the State, or who resorts to another State for his remedy, if jurisdiction can be obtained, may subject the defendant in an action of tort to entirely different rules and liabilities from those which would control the controversy were it carried on where the injury occurred; and, as by the law of Massachusetts it is required that a person injured while travelling upon a railroad must prove, not only the negligence of the defendant, but also that he himself was in the exercise of due care, and as jurisdiction may be obtained by an attachment of property of the defendant in another State, the plaintiff might relieve himself of the necessity of proving his own due care, if, by the law of the State to which he may resort, such proof is not required, and thus put upon the railroad company a higher responsibility than is imposed by the State in which it was performing its business. In a similar way, if a traveller upon a steam or horse railroad could not recover in this State for an injury done by carelessness in transporting him, because he was travelling upon Sunday, in violation of the laws of the State, he might, unless the law prescribed in this State is to govern, recover in any State where laws forbidding travelling on Sunday did not exist, if jurisdiction could there be obtained over the defendant or its property. Where an injury occurs in another State, which would be the foundation of an action at common law, and it is known that the general law of that State is the common law, it may be inferred that the transaction is governed by its rules as here applied, in the absence of evidence to the contrary; but, when it is shown to be otherwise, the law of the State where the injury occurs is to be regarded. It is a general principle, that, in order to maintain an action of tort founded upon an injury to person and property, the act which is the cause of the injury and the foundation of the action must at least be actionable by the law of the place where it is done, if not also by that of the place in which redress is sought. *Le Forest v. Tolman*, 117 Mass. 109, and cases cited. It must be for the State of Connecticut to prescribe when, and under what circumstances, a cause of action shall arise against a corporation which operates a railway within its limits, by reason of an act done by it. It may provide that, for an injury done by its carelessness, there shall be no cause of action on behalf of the injured party, but punishment by indictment only, or it may give to such injured person a cause of action, and for the same injury make the corporation

responsible, by indictment or other proceeding, for a fine or damages which shall go to the State, to relatives of the injured party, or to any other persons named. *Commonwealth v. Metropolitan Railroad*, 107 Mass. 236.

The intestate did, by the common law of Connecticut, have a right of action during her lifetime, but for this has been substituted in that State, she having deceased, the penal action created by the statute.

It is the contention of the plaintiff, that the cause of action may be held to survive by virtue of our statute, notwithstanding no cause of action now exists in Connecticut. Pub. Sts. c. 165, § 1. That the special action in Connecticut can now be maintained is not controverted. If, therefore, this contention of the plaintiff is correct, the defendant continues liable for its act or neglect in Connecticut by the law of Massachusetts, while it is also liable by reason of the penalty imposed upon it by the law of Connecticut as a substitute for its original liability, such penalty being still capable of enforcement. The design of our statutes of survivorship is primarily to provide for survival of those actions of tort the causes of which occur in this State. If similar statutes existed in another State, where the original cause of action accrued, it would not be difficult to hold that our own applied to such causes, upon the same principle by which we hold that the intestate herself might originally have brought her action here. When no such cause of action now exists in the State where the injury occurred, it is not easy to see how it can exist here, especially when, in such State, another cause of action, growing out of the same facts, has been substituted for it. This would be to subject the defendant to two liabilities, one existing by the law of the State in which jurisdiction over person or property was obtained, but in which the accident did not occur; and the other imposed by the law of the State where it did occur, and where the defendant had its residence; while in either State the liability there imposed would be the only one to which the defendant could by its law be subjected.

It may be suggested, that the law of Connecticut, in failing to provide that an action for a personal injury shall survive to the administrator, has, negatively, only the same effect as a statute of limitations, which operates merely to take away the remedy of a plaintiff, while his cause of action still exists.

By the ancient common law, as it existed before the St. of 4 Edw. III. c. 7, which was adopted and practised on in this State before the Constitution, 6 Dane Abr. 607, no action *ex delicto* survived to the personal representative, the maxim *Actio personalis moritur cum persona* being of universal application. *Wilbur v. Gilmore*, 21 Pick. 250. Subsequently to that statute, which was liberally construed, an action for a tort, by which the personal property of one was injured or destroyed, survived to his administrator, such tort being an injury to the property which otherwise would have descended to him. But the theory that a personal injury to an individual was limited to him only,

that no one else suffered thereby, and that therefore by his decease the cause of action itself ceased to exist, continued.

While the action for personal injury is spoken of as surviving, as there previously was no responsibility to the estate, the statute creates a new cause of action. It imposes a new liability, and does not merely remove a bar to a remedy such as is interposed by the statute of limitations, which, if withdrawn by the repeal of the statute, would allow an action to be maintained for the original cause. What the new liability shall be, by what conditions it shall be controlled, and whether the original liability shall be destroyed, must be determined by the law of the State where the injury occurs, unless the legislation of other States is to have extraterritorial force, and govern transactions beyond their limits. We perceive no intention to invest it with such force, even if it were possible so to do.

By the decease of the intestate, the cause of action at common law which she once had in Connecticut has there ceased to exist. It is for that State to determine what provision, by action or indictment, if any, shall be made in order to indemnify the estate of the intestate, or her relatives, or to punish the party causing the injury to her. Our statute, permitting the survival of similar actions in this State, does not therefore apply.

The question considered in the case at bar was fully and ably discussed in *Needham v. Grand Trunk Railway*, 38 Vt. 294, and the same result reached as that at which we have arrived. To the same effect also is *State v. Pittsburgh & Connellsville Railroad*, 45 Md. 41.

The plaintiff, in his argument, attaches importance to the St. of 1873, c. 289, by virtue of which the defendant's railroad is operated in the several States through which it runs as a continuous line; but the fact that it is a corporation by the law of Massachusetts as well as by that of Connecticut cannot make its liabilities different or greater in this State on account of transactions occurring entirely in Connecticut; nor are the rights of the plaintiff greater because his intestate, who was injured in this transaction, was a citizen of this Commonwealth. *Whitford v. Panama Railroad*, 23 N. Y. 465, 472; *Richardson v. New York Central Railroad*, *ubi supra*.

The ruling that the action could be maintained was therefore erroneous.

*Exceptions sustained.*¹

¹ *Acc. Davidow v. Pennsylvania R. R.*, 85 Fed. 943; *De Ham v. Mex. Nat. Ry.*, 86 Tex. 68, 23 S. W. 381; *Needham v. R. R.*, 38 Vt. 294. — ED.

NORTHERN PACIFIC RAILROAD v. BABCOCK.

SUPREME COURT OF THE UNITED STATES. 1894.

[Reported 154 United States, 190.]

THE plaintiff below, who was the administrator of the estate of Hugh M. Munro, sued in the District Court of the Fourth Judicial District of Minnesota to recover \$25,000 damages for the killing of Munro on the 10th day of January, 1888, at or near a station known as Gray Cliff on the Northern Pacific Railway in the Territory of Montana.

There was a verdict and judgment below in favor of the plaintiff for \$10,000. To review that judgment this writ of error was sued out. The errors assigned were as follows:

“Third. The court erred further in charging the jury as follows: ‘Many States have different laws. The law in this State until recently was that only \$5,000 could be given in a case of death. It has lately been increased to \$10,000.’

“Fourth. The court erred further in charging the jury as follows: ‘If you believe from all the evidence in the case that the plaintiff is entitled to recover, then it is for you to determine what compensation you will give for the death of the plaintiff’s intestate. The law of Montana limits it to such an amount as you think it would be proper under all circumstances of the case, and that is the law which will govern in this case.’

“Sixth. The court erred further in refusing to give to the jury the following request tendered by defendant’s counsel: ‘The laws of Minnesota limit the amount of damages to be recovered in this case to five thousand dollars.’”¹

WHITE, J. The third, fourth, and sixth assignments involve the same question, and may be decided upon together.

¹ Only so much of the case as deals with these assignments of error is given. — ED.

The plaintiff's intestate was an engineer in the employ of the defendant corporation in the Territory of Montana, and the accident by which he lost his life occurred there. The law of the Territory of Montana at the time provided as follows:

"Where the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his action, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just." (Section 14, title II., chapter I., first division of the Code of Civil Procedure of the Territory of Montana.)

Under the law of Minnesota, when the death occurred, the limit of recovery in case of death was \$5,000, but at the time of the trial of the case in the court below this limit had been increased to \$10,000 by amendment of the Minnesota statutes.

The question which those assignments of errors present is, was the amount of damage to be controlled by the law of the place of employment and where the accident occurred, or by the law of the forum in which the suit was pending? In the case of *Herrick v. Minneapolis & St. Louis Railway Co.*, reported in 31 Minnesota, 11, which involved the question of whether the courts of Minnesota would enforce and apply to a suit in that State for a cause of action originating in Iowa a law of the State of Iowa making railroad corporations liable for damages sustained by its employees in consequence of the neglect of fellow-servants, the court said:

"The statute of another State has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*.

"The defendant admits the general rule to be as thus stated, but contends that as to statutory actions, like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text-writers—notably, Rorer on Interstate Law—seem to lay down this rule, but the authorities cited generally fail to sustain it.

"But it by no means follows that, because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. Every day our courts are enforcing rights under foreign contracts where the *lex loci*

contractus and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the State where made. To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the State of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

This opinion of the Supreme Court of Minnesota is in accord with the rule announced by Chief Justice Marshall in *The Antelope*, 10 Wheat, 66. In referring to that case in *Texas & Pacific Railway v. Cox*, 145 U. S. 593, the court said: "the courts of no country execute the penal laws of another. But we have held that that rule cannot be invoked as applied to a statute of this kind, which merely authorizes a civil action to recover damages for a civil injury." The rule thus enunciated had been adopted in previous cases, and has since been approved by this court. *Smith v. Condry*, 1 How. 28; *The China*, 7 Wall. 53, 64; *Dennick v. Railroad Co.*, 103 U. S. 11; *The Scotland*, 105 U. S. 24, 29; *Huntington v. Attrill*, 146 U. S. 657, 670. Indeed, in *Texas & Pacific Railway Co. v. Cox*, *supra*, Mr. Chief Justice Fuller, speaking for the court, said: "The question, however, is one of general law, and we regard it as settled in *Dennick v. Railroad Co.*"

The contract of employment was made in Montana, and the accident occurred in that State, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*.

THE "HALLEY."

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1868.

[*Reported Law Reports*, 2 *Privy Council*, 193.]

SELWYN, L. J. This is an appeal from an order by the judge of the High Court of Admiralty, dated the 26th of November, 1867, and admitting the third article of the reply filed by the plaintiffs in the court below, who are the present respondents.

The cause is a cause of damage promoted by the respondents as owners of a Norwegian barque called the "*Napoleon*," against a British steamship called the "*Halley*," and her owners, for the recovery of damages occasioned to the respondents by reason of a

collision which took place on the 8th of January, 1867, in Flushing Roads, between the "Napoleon" and the "Halley."

In their petition the respondents state that the collision was caused by the negligent and improper navigation of the "Halley."

The appellants, in their answer to that petition, state that the "Halley" is a steamship belonging to the port of Liverpool, and that "by the Belgian or Dutch laws which prevail in and over the river Scheldt, and to which the said river is subject, from the place where the said river pilot came on board the 'Halley,' and thence up to and beyond the place of the aforesaid collision, it was compulsory on the said steamer to take on board and be navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws; and it was by virtue of such laws that the 'Halley' was compelled to take on board and to be given in charge, and until the time of the said collision, as aforesaid, to remain in charge of, and did take on board, and was given in charge, and up to the time of the said collision remained in charge of the said river pilot, who was duly appointed or licensed according to the said laws, and whom the defendants or their agents did not select and had no power of selecting;" and "that the collision was not caused by the negligence, default, want of skill, or improper conduct of any person on board the 'Halley,' except the said river pilot."

In reply to this answer, the respondents pleaded the following, being the third article in their reply: "By the Belgian or Dutch laws in force at the time and place of the said collision, the owners of a ship which has done damage to another ship by collision, are liable to pay and make good to the owners of such lastly mentioned ship all losses occasioned to them by reason of such collision, notwithstanding that the ship which has done such damage was, at the time of the doing thereof, being navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws, and notwithstanding that such damage was solely occasioned by the negligence, default, or want of skill of such pilot, without any contributory negligence on the part of the master or crew of such lastly mentioned ship, and notwithstanding that it was at the time and place of the collision, by the said laws, compulsory on such lastly mentioned ship to be navigated under the direction and in charge of such pilot; and the defendants, the owners of the 'Halley,' are by virtue of the said laws, liable to pay and make good to the plaintiffs all losses occasioned to them by the said collision, even if the statements contained in the eleventh article of the said answer be true."

The appellants having moved the court below to reject the third article of the reply, on the ground that, even if the third article were true, the appellants would not be liable in the Court of Admiralty in England, the learned judge of that court has made the order now under appeal, by which he has refused the motion of the appellants, and has sustained the third article of the reply.

The claim of the respondents is stated by the learned judge to be founded upon a tort committed by the defendants in the territory of a foreign State, and we are not called upon to pronounce any opinion as to the rights which the respondents might have obtained, either against the appellants as the owners of the "Halley," or as against the ship, if the respondents had instituted proceedings and obtained a judgment in the foreign court. For this cause is a cause for damage instituted by petition in the High Court of Admiralty in England; and it is admitted by the counsel for the respondents that the question before us must be decided upon the same principles as would be applicable to an action for damages for the collision in question if commenced in the Court of Queen's Bench or Common Pleas. But it is contended on their part, and has been held by the learned judge in the court below, that the respondents are entitled to plead that the law of Belgium, within whose territorial jurisdiction the collision took place, renders the owners of the "Halley," although compelled to take a pilot on board, liable to make reparation for the injury which she has done.

Their Lordships agree with the learned judge in his statement of the common law of England, with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel, while under the control of a pilot, whom the owner was compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned, must always be considered as the acts of the owner.

This exemption of the owner from liability when the ship is under the control of what has been termed a "compulsory pilot" has also been declared by express statutory enactments. *Vide* Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, § 388.

In cases like the present, when damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be, and frequently is, figuratively spoken of as the wrongdoer; but it is obvious, that although redress may sometimes be obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrongdoer.

Assuming, as, for the purposes of this appeal, their lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the common law and statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound

to receive or obey their orders, was entitled to supersede, and had, in fact, at the time of the collision, superseded, the authority of the master appointed by them; and their lordships think that the maxim, "*qui facit per alium, facit per se*," cannot by the law of England be applied, as against the appellants, to an injury occasioned under such circumstances; and that the tort upon which this cause is founded is one which would not be recognized by the law of England as creating any liability in, or cause of action against, the appellants.

It follows, therefore, that the liability of the appellants, and the right of the respondents to recover damages from them, as the owners of the "Halley," if such liability or right exists in the present case, must be the creature of the Belgian law; and the question is, whether an English court of justice is bound to apply and enforce that law in a case, when, according to its own principles, no wrong has been committed by the defendants, and no right of action against them exists.

The counsel for the respondents, when challenged to produce any instance in which such a course had been taken by any English court of justice, admitted his inability to do so, and the absence of any such precedent is the more important, since the right of all persons, whether British subjects or aliens, to sue in the English courts for damages in respect of torts committed in foreign countries has long since been established; and, as is observed in the note to *Mostyn v. Fabrigas*, in Smith's *Leading Cases*, vol. i. p. 656. there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which had prevailed to the contrary seems to be erroneous.

In the case of "*The Amalia*," 1 Moore's P. C. Cases (n. s.) 484, Lord Chelmsford, in delivering the opinion of the judicial committee, said: "Suppose the foreigner, instead of proceeding *in rem* against the vessel, chooses to bring an action for damages in a court of law against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law which the court would be bound to administer."

As Mr. Justice Story has observed in his *Conflict of Laws*, p. 32, "it is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extraterritorial effect, when those laws are prejudicial to the rights of the other nations or to those of their subjects." And even in the case of a foreign judgment, which is usually conclusive *inter partes*, it is observed in the same work, at § 618A, that the courts of England may disregard such judgment *inter partes* if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognized in England or other foreign countries, or is founded upon a misapprehension of what is the law of England. *Simpson v. Fogo*, 1 H. & M. 195.

It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their lordships' opinion, alike contrary to principle and to authority to hold, that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

The case of *Smith v. Condry*, 1 Howard's Rep. (U. S.) 28, in the Supreme Court of the United States, appears at first sight to have an important bearing upon this case; but, upon an investigation of the report, it does not appear that any question as to a conflict between the English law and the American law was discussed in that case, or that the precise point now under consideration was noticed in the judgment, nor is it specifically mentioned in any of the three exceptions which were taken to the decision of the inferior court, and there is no report of the arguments.

Their lordships think, therefore, that that case cannot be treated as an authority sufficient to support the contention of the respondents; and, on the whole, they think it their duty humbly to advise Her Majesty to allow this appeal, and to order that the third article of the plaintiff's reply be rejected, and that there should be no costs of this appeal.

CHAPTER X.
OBLIGATIONS EX CONTRACTU.

SECTION I.

PLACE OF CONTRACTING.

BARING v. INLAND REVENUE COMMISSIONERS.

COURT OF APPEAL. 1897.

[*Reported* [1898] 1 *Queen's Bench*, 78.]

THE question raised was whether an unregistered bond, of which the appellant, the Honourable J. Baring, was the holder, whereby the Atchison, Topeka and Santa Fé Railway Company, a corporation organized under the laws of Kansas, in the United States (hereinafter called the new company), promised to pay to bearer, or, if the bond should be registered as thereafter provided, to the registered holder thereof, the sum of 1,000 dollars with interest thereon at the rate of 4 per cent per annum until the principal became due, was subject to duty under the Stamp Act, 1891, as being a marketable security by or on behalf of a foreign company made or issued in the United Kingdom within s. 82, sub-s. (b), (i.), of that act.¹

A. L. SMITH, L. J. I am of opinion that this appeal should be dismissed. It is not necessary for me to state the facts in detail. They may be summarized as follows. There was a company called the Atchison, Topeka and Santa Fé Railway Company, incorporated under the law of Kansas. In 1895 that company was in difficulties, and a reorganization scheme was set on foot. By that scheme there was to be a foreclosure suit against the old company, which was to be wound up, a new company was to come into existence in its stead, and the bondholders of the old company were to become bondholders of the new company. The scheme was carried out in 1896. The new company, in pursuance of the scheme, issued bonds, the form of which is very material. There is an express stipulation on the face of the bond that it shall not be valid for any purpose unless authenticated by the certificate thereon indorsed of the trustee under the mortgage or deed

¹ The statement of facts and arguments of counsel are omitted. — Ed.

of trust. The document seems to me on the face of it not really to be a bond, but a mere piece of paper till that certificate is signed. What happened in this case was this. One of these documents was sent from New York to London in order that it might be handed over to the appellant, who, as having been a bondholder of the old company, was entitled to a bond of the new company. Instead, however, of converting the document into a bond in New York, in order to avoid the payment of a heavy premium for insurance, it was sent over here as an inchoate instrument, and not a bond at all, and the vice-president of the trust company also came over to this country to sign the requisite certificate here and so convert the document into a bond. The certificate having been thus signed, the bond was delivered to Messrs. Baring Brothers & Co., and by them handed over to the appellant. The question which arises is, where was this bond issued? It was contended that it was issued in New York when the piece of paper was given to the trust company. I say certainly not. It is true that a piece of paper was then handed to the trustee, but it cannot be said that a bond was then issued, for it was not. I do not think there can be an issue of an instrument within the statute until it is an actual, valid, subsisting instrument. I think that this bond was first issued in this country after it became a valid instrument by the signing of the indorsed certificate thereon, until which time it was a mere piece of paper and not a bond. I cannot understand how it can be said that a bond has been issued before it is a bond. It became a marketable security when the certificate was signed, and not till then. For these reasons I think that the appeal should be dismissed.

RIGBY, L. J.¹ I am of the same opinion. The sole question really appears to me to be whether this instrument, which came into the hands of the appellant as the person entitled to it under the scheme of reorganization, was issued in this country or not, and I cannot entertain any doubt that it was so issued. What is the meaning in any fair sense of the word "issued" in the section? Of course a document is not issued if, when sealed, it is put away in a box and kept there. Nor do I consider that a document, even if it were complete when signed, could be said to be issued, if it were handed over to an agent with instructions that he was not to part with it or make it an instrument on which any one could sue until some consideration was received, as in the case of an ordinary mortgage deed which is sealed but is not to be handed over to the mortgagee or to become an effective mortgage deed until the mortgage money is paid. It seems to me impossible to argue that in such cases there could be said to be an issue in America, even if the document were complete when signed, if it were only to be handed over to the person who was to sue upon it upon something being done, as, for example, on paying the consideration money. An instrument can only be said to be issued in my opinion when it gets into the hands of a

¹ Part of this opinion and the concurring opinion of COLLINS, L. J., are omitted.
—Ed.

person who can avail himself of it. It seems to me that that is the ordinary meaning of the word "issued," and at any rate its meaning in the act which we have to construe. When this document was executed by the company in America, had everything been done that was necessary to make it an available instrument? Certainly not. On the contrary, it was guarded by a condition on the face of the document that it should have no validity until certified by the trust company. It was argued that, as the trust company were dealing with the matter under the orders and directions of the joint executive committee, the bond had gone beyond the control of the railway company, and that constituted the test as to whether it had been issued. I cannot accede to that view. In the instance which I gave of an instrument being sent to an agent with instructions to deliver it to a person on payment of the consideration money, the instrument would be beyond the control of the sender in the sense in which this bond was beyond the control of the railway company. The company had a bargain which was to be fulfilled, and, unless it were fulfilled, they could not get the advantages for which they had bargained. During the transmission of the document from New York, and until the certificate was signed, no one could sue on it. Until the certification there could be no issue. I do not say that there was an issue upon the certification; but when the certified bond, being then a complete instrument, which might be sued upon if handed over to a person who was entitled to it, was handed over to such a person, I do not doubt there was an issue. There can be only one issue within the meaning of the act, and that is when the instrument first gets into the hands of some one who can make it available for his benefit.¹

NORTHAMPTON MUTUAL LIVE STOCK INSURANCE
CO. v. TUTTLE.

SUPREME COURT, NEW JERSEY. 1878.

[Reported 40 *New Jersey Law*, 476.]

VAN SYCKEL, J.² The plaintiff brought suit before a justice of the peace of the county of Warren, to recover the amount of an assessment made against the defendant upon a policy of insurance issued to him by the plaintiff company. The plaintiff recovered a judgment before the justice, which was reversed in the Warren Common Pleas, on the ground that the insurance company, plaintiff, was a foreign insurance

¹ *Acc. Aultman v. Holder*, 68 Fed. 467. The place of delivery of a bond or negotiable instrument is the place of contracting, not the place where the instrument is written or signed. *Young v. Harris*, 14 B. Mon. 556; *Watson v. Lane*, 52 N. J. L. 550, 20 Atl. 894; *Pugh v. Cameron*, 11 W. Va. 523.—Ed.

² Part of the opinion is omitted.—Ed.

company, and that the contract was a New Jersey contract, negotiated by an agent in New Jersey, contrary to our statute. Nix. Dig. 435, § 66; Ib. 436, § 73.

The policy was dated May 27, 1872, and insured defendant for the term of one year. An assessment was made July 2, 1872, which paid the company's losses to that date. The losses from July 2, 1872, to January 14, 1873, amounted to about \$12,000, and this sum was the basis of the assessment for which the defendant was sued.

The property insured was in this State, where the defendant and Thatcher, one of the directors of the insurance company, resided when the policy was issued.

The application was signed by the defendant in this State, where Thatcher gave him a receipt, of which the following is a copy:

“Northampton Mutual Live Stock Insurance Company, of Northampton County, Pa.

“Received of Wm. Tuttle, for an insurance by the Northampton Mutual Live Stock Insurance Company against loss by death upon the animals described in application, the sum of one dollar and thirty cents, being the amount paid for membership for the term of one year from the 27th day of May, 1872, for which said company agrees to issue a policy to said applicant when the application is approved, and if not approved, the above amount to be refunded to the said applicant.

“J. B. THATCHER,

“Dated May 27, 1872.

Agent.”

Article VI. of the by-laws of the company provided that the agent of the company should give a receipt for the premium paid, and that the insurance should take effect from that time, provided the application was approved by the board of directors, or its executive committee, after which the policy would be issued; and if not approved, the money would be refunded.

In this case the application for insurance was taken by Thatcher to Easton, in the State of Pennsylvania, where it was approved by the directors of the company, and the policy was there issued and sent by mail to the defendant, in New Jersey.

If the contract of insurance was made in the State of Pennsylvania, and was valid there, comity requires us to enforce it here. *Columbia Ins. Co. v. Kinyon*, 8 Vroom, 33.

This case, therefore, turns upon the question whether it was made in this State.

Thatcher acted as the agent of the company, with authority to receive applications. He received the defendant's application, with the premium, which he transmitted to the company at its place of business in Pennsylvania. By the express terms of the receipt given by the agent to the defendant, the company had the option to approve the application and issue a policy, or to reject it and refund the premium.

It was a mere proposition, from which the parties might have receded, and not a contract. Approval by the company was necessary to ripen it into a contract. Not until then did the minds of the parties come together, and invest the transaction with the attributes of a valid agreement. The contract of insurance must be regarded as having been made when the company approved the defendant's application, and issued and transmitted to him their policy. *Hyde v. Goodnow*, 3 N. Y. 266; *Huntley v. Merrill*, 32 Barb. 626.

The contract must be held to have been made where the last act necessary to complete it was done.

Although there is some conflict in the cases, I think the weight of authority is, that when the offer of the insured was accepted, and the policy deposited in the post office by the company, properly addressed to the insured, the contract was made. It did not remain incomplete until the insured, by receiving the policy, was notified of the acceptance of his proposal. . . .

It being conceded that the approval of the application was given in Pennsylvania, and the policy mailed there, the contract must be adjudged to have been made in that State, and not in New Jersey. The contract, therefore, is valid, and comity requires its enforcement here. *Columbia Fire Insurance Co. v. Kinyon*, 8 Vroom, 33. . . .

The judgment of the Warren Pleas, that the contract was void under the statute law of this State, was erroneous, and should be set aside.¹

EQUITABLE LIFE ASSURANCE SOCIETY v. CLEMENTS.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 140 *United States*, 226.]

THIS was an action brought by Alice L. Wall, a citizen of Missouri and widow of Samuel E. Wall, and prosecuted by Benjamin F. Pettus, her administrator, against the Equitable Life Assurance Society of the United States, a corporation of New York and doing business in Missouri, on a policy of insurance executed by the defendant at its office in the city of New York on December 23, 1880, upon the life of Samuel E. Wall, by which, in consideration of the payment of \$136.25 by him, and of the payment of a like sum on or before December 15 in each year during the continuance of the contract, it promised to pay to Alice L. Wall, his wife, \$5,000 at its office in the city of New York, within sixty days after satisfactory proofs of his death.² . . .

¹ *Acc. Com. Mut. Fire Ins. Co. v. Wm. Knabe Mfg. Co.*, 171 Mass. 265, 50 N. E. 516; *Hyde v. Goodnow*, 3 N. Y. 266. See *Voorheis v. Peoples' Mut. Ben. Soc.*, 91 Mich. 469, 51 N. W. 1109; *Davis v. Ins. Co.*, 67 N. H. 218, 34 Atl. 464; *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969. — Ed.

² The statement of facts and part of the opinion are omitted. — Ed.

GRAY, J. Upon the question whether the contract sued on was made in New York or in Missouri, there is nothing in the record, except the policy and application, the petition and answer, by which the facts appear to have been as follows: The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy, executed at the defendant's office in New York, provides that "the contract between the parties hereto is completely set forth in this policy and the application therefor, taken together." The application declares that the contract "shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance." The petition alleges that that premium and two annual premiums were paid in Missouri. The answer expressly admits the payment of the three premiums, and, by not controverting that they were paid in Missouri, admits that fact also, if material. Missouri Rev. Stat. 1879, § 3545. The petition further alleges that the policy was delivered in Missouri; and the answer admits that the policy was, "at the request of the said Wall, transmitted to the State of Missouri and was delivered to said Wall in said State." If this form of admission does not imply that the policy was at the request of Wall transmitted to another person, perhaps the company's agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri. Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri. . . .

It follows that the insertion, in the policy, of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid, as well as the insertion, in the application, of a clause by which the beneficiary purports to "waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State, or not," is an ineffectual attempt to evade and nullify the clear words of the statute.

*Judgment affirmed.*¹

¹ *Acc. Hicks v. Ins. Co.*, 60 Fed. 690; *Ford v. Ins. Co.*, 6 Bush, 133; *Cromwell v. Ins. Co.*, 49 Md. 366; *Fidelity Mut. L. Ass. v. Ficklin*, 74 Md. 172, 21 Atl. 680; *Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59; *Estate of Breitung*, 78 Wis. 33, 46 N. W. 691. — ED.

STAPLES v. NOTT.

COURT OF APPEALS, NEW YORK. 1891.

[Reported 128 New York, 403.]

GRAY, J. The promissory note in suit bears date at Washington, D. C., April 5, 1889; was made payable at a bank in Watertown, N. Y., and carried interest at the rate of seven per cent per annum. The appellant was indorser upon it, and defends on the ground of usury. If the contract of the parties, which is evidenced by this note, was governed by the laws of this State, the defence should have prevailed; but if made under the laws of the District of Columbia the judgment was right and should be sustained.

The note was given in renewal of a balance due upon a prior note, made by and between the same parties, which bore date at Washington, D. C., April 5, 1888; was payable one year after date at a bank in Washington; bore the same rate of interest and was similarly indorsed. Some payments were made on account of the principal, but, before its maturity, the maker requested of plaintiff, a resident of Washington, by letter, to renew for the balance remaining due. Failing to receive any reply, he went on to Washington and there prevailed upon the plaintiff to agree to take a new note for his debt. This note was then drawn by the plaintiff and handed to the maker for execution, who took it back to his home in Syracuse, N. Y., where his and the appellant's signatures were affixed, as maker and indorser respectively. It had been agreed with the plaintiff that, upon this new note being returned to him, he would send back the original note, and the appellant himself mailed the renewal note to the plaintiff in Washington.

These facts, which were not disputed, should make it perfectly obvious that there was here every essential to a valid contract under the laws of the plaintiff's domicil, and the only accompaniment lacking to a full local coloring was the foreign place named for payment. For the affixing of the signatures to the note by the maker and the indorser, however important as acts, was yet but a detail in the performance and execution of the contract which had been agreed upon with the plaintiff. But naming a New York bank as the place where the maker would provide for the payment of the note did not characterize the contract in one way or the other. That arrangement was one simply for the convenience of the maker. It could have no peculiar effect. The transactions, which resulted in an agreement to extend the time for the payment of the debt and to accept a new note, took place wholly in the District of Columbia, and what else was enacted in the matter elsewhere neither added to nor altered the agreement of the parties. Though the engagement of the indorser, in a sense, was independent of that of the maker, that proposition is one which does not affect the local character of the contract, but which simply concerns the question of the

enforcement of the indorser's liability. Whatever the previous knowledge of the appellant, as to the negotiations and the agreement for a renewal of the promise to pay between the maker of the old note and the plaintiff, the question is without importance. When he indorsed the note, which had been prepared and was brought to him, and sent it through the mail to the plaintiff, his engagement was with respect to a contract validly made according to the laws of the District of Columbia, and when the note was received by the plaintiff the transaction was then consummated in that place. In *Lee v. Selleck*, 33 N. Y. 615, it was said, with respect to an indorsement in Illinois of a note made in New York, that the fact of the indorser writing his name elsewhere was of no moment. Upon delivery by his agent to the plaintiffs in New York, it became operative as a mutual contract.

The agreement, which was made in Washington for the giving of the promissory note in question, was the forbearance of a debt already due, upon which the appellant was liable; and the renewal of his engagement as indorser upon the note, without any qualification of his contract of indorsement, was in fact an act in ratification and execution of the previous agreement. That agreement between the plaintiff and the maker in Washington took its concrete legal form in a note, prepared there by the plaintiff, with a rate of interest sanctioned by the laws of his domicile, adopted by the appellant by indorsement in blank, and made operative as a mutual contract by delivery to plaintiff in Washington through the mails.

For the court to hold, because the note was not actually signed and indorsed in the District of Columbia, where the agreement, it evidenced, was made, or because it was made payable in another State, that the contract was void as contravening the usury laws of the place of signature and of payment, would be intolerable and against decisions of this court. *Wayne Co. Sav. Bank v. Low*, 81 N. Y. 566; *Western T. & C. Co. v. Kilderhouse*, 87 N. Y. 430; *Sheldon v. Haxtun*, 91 N. Y. 124.

I think the plaintiff was entitled to recover, as upon a contract made under the government of the laws of the District of Columbia, and, therefore, valid and enforceable in any State.

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

¹ *Acc. Findlay v. Hall*, 12 Oh. S. 610. See *Bascom v. Zediker*, 48 Neb. 380, 67 N. W. 148; *Rowland v. B. & L. Ass.*, 115 N. C. 825, 18 S. E. 965; *Mills v. Wilson*, 88 Pa. 118.

In an ordinary case, where a note is sent by mail by the maker to the payee, the contract is made at the place of mailing. *William Glenny Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711; *Barret v. Dodge*, 16 R. I. 740, 19 Atl. 530.

A contract to guaranty a debt is made where the debt is created. *Alexandria, A. & F. S. R. R. v. Johnson*, 61 Kan. 417, 59 Pac. 1063; *Milliken v. Pratt*, 125 Mass. 374, *supra*, p. 11; *John A. Tolman Co. v. Reed*, 115 Mich. 71, 72 N. W. 1104; and see *S. v. Williams*, 46 La. Ann. 922, 15 So. 290. — Ed.

MACK v. LEE.

SUPREME COURT OF RHODE ISLAND. 1881.

[Reported 13 Rhode Island, 293.]

DURFEE, C. J. This is assumpsit to recover \$312.50 for five barrels of whiskey sold by the plaintiff, a trader in New York, to the defendant, a retail dealer in Woonsocket, in this State. The sale was made in pursuance of an order addressed by the defendant to the plaintiff in New York for the whiskey to be sent to the defendant by the Stonington Line on three months' credit. The whiskey was delivered in New York for transportation by the Stonington Line to the defendant in Woonsocket, he paying the freight. It appeared, on cross-examination of the plaintiff's witnesses, that the order for the whiskey was obtained by one Levy, a travelling agent for the plaintiff, who visited the defendant at his place of business in Woonsocket, having samples of liquors with him, and there solicited the order. There was also some evidence that Levy offered to sell the whiskey to the defendant, at Woonsocket, though the plaintiff and Levy also testified that Levy had no authority to negotiate sales for the plaintiff, but only to obtain orders, which the defendant would fill or not, according to his own judgment. After the introduction of the plaintiff's testimony, the defendant moved that the plaintiff be nonsuited, on the ground that an offer in Rhode Island to sell the whiskey was in violation of Pub. Laws R. I. cap. 508, § 18, of June 25, 1875, and that therefore under § 44 of this chapter the plaintiff could not recover. The court granted the motion. The plaintiff excepted and petitions for a new trial for error in the ruling.

We think the court erred. The sale was consummated in New York when the plaintiff delivered the whiskey there to the Stonington Line in execution of the defendant's order. *Schlesinger & Blumenthal v. Stratton*, 9 R. I. 578. The sale therefore, independently of Levy's offer, if he made any offer, was clearly valid. In what way did Levy's offer, if he made any offer, make it invalid? If the offer was an offer to sell in New York, it was not a violation of cap. 508, § 18, for § 18 only prohibits an offer to sell by sample or otherwise when it is an offer to sell "in violation of the preceding sections;" i. e., when it is an offer to sell in Rhode Island. But if the offer was an offer to sell in Rhode Island, then the offer was neither accepted by the defendant nor carried out by the plaintiff, for the order given by the defendant and executed by the plaintiff was an order for whiskey to be sold and delivered in New York, and we do not see, therefore, how the offer, though in itself it may have been criminal, can be held to have infected the sale with criminality or to have prejudiced the plaintiff's right to recover on it. *Exceptions sustained.*¹

¹ *Acc. Atlantic Phosphate Co. v. Ely*, 82 Ga. 438; *S. v. Colby*, 92 Ia. 463, 61 N. W. 187; *Clafin v. Mayer*, 41 La. Ann. 1048; *Boothby v. Plaisted*, 51 N. H. 436. See *Rindskopf v. DeRuyter*, 39 Mich. 1. — Ed.

HILL v. CHASE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[Reported 143 Massachusetts, 129.]

MORTON, C. J. The only question presented by this bill of exceptions is whether the presiding justice of the Superior Court, who tried the case without a jury, was justified in finding that the contract sued on was made in this State.

It appeared in evidence that the defendant, a married woman living in Salem in the State of New Hampshire, in the summer of the year 1864, employed her sister, Mrs. Shirley, to borrow for her fifty dollars of Mr. Hill, her brother, living in Salem in the State of Massachusetts. Mr. Hill declined to lend the money, but the plaintiff, his wife, out of her own money, delivered to Mrs. Shirley fifty dollars, together with a paper, of which the following is a copy :

"Salem, July 1, 1864. Borrowed and received from Nancy D. Hill the sum of fifty dollars.

"Sign this and return it."

Mrs. Shirley carried the money and paper to the defendant, who took and kept the money, signed the paper, knowing its contents, and returned it to the plaintiff at Salem in this State.

The presiding justice was justified in finding that, according to the understanding and purpose of the parties, the plaintiff lent to the defendant, through her agent, Mrs. Shirley, the sum of fifty dollars at Salem in Massachusetts; and that the defendant ratified the acts of her agent. There is no evidence which shows that the plaintiff employed Mrs. Shirley as her agent to lend money for her in New Hampshire. The justifiable inference from all the evidence is, that the parties intended that the transaction should be in form, what it was in substance, a loan by the plaintiff to the defendant, the plaintiff assuming, what the evidence shows to have been true, that the defendant had no choice as to the person of whom she borrowed, and that she would ratify the act of her agent.

This being so, the fact that the paper was signed in New Hampshire is immaterial. The contract of loan being made in this State, upon the condition that the paper should be signed and returned to the plaintiff in this State, the paper became operative as evidence of the contract when it was delivered to the plaintiff in this State. *Lawrence v. Bassett*, 5 Allen, 140; *Milliken v. Pratt*, 125 Mass. 374.

We are therefore of opinion, that the Superior Court was justified in refusing to rule that the contract sued on was made in New Hampshire, and in the finding that it was made and to be performed in Massachusetts, and therefore is to be governed by the laws of this State.

Exceptions overruled.

PERRY v. MOUNT HOPE IRON COMPANY.

SUPREME COURT OF RHODE ISLAND. 1886.

[Reported 15 *Rhode Island*, 380.]

DURFEE, C. J.¹ This is an action to recover damages of the defendant corporation for refusing to receive a cargo of "bolt and nut scrap and boiler-plate" iron, so called, which the plaintiff claims the defendant agreed to buy at the rate of 87½ cents per hundred, delivered at its works in Somerset, Mass. Upon trial in the Court of Common Pleas, the jury found a verdict for the plaintiff. The case is before us on the defendant's petition for a new trial for alleged misrulings, and on the ground that the verdict was against the evidence and the weight thereof. The plaintiff lives and does business in Providence. The defendant is a Massachusetts corporation, having its business establishment in Somerset, Mass. Job M. Leonard is treasurer, and has an office in Boston. He makes purchases for the defendant. On the trial in the court below, the plaintiff put in testimony to show that his agent visited Leonard April 30, 1885, and informed him that the plaintiff had the "nut and bolt shop scrap," and solicited an offer for it; that Leonard offered 87½ cents per hundred, delivered at the company's wharf, and the agent asked him to let the offer stand until the next day, which Leonard agreed to do; and that the next day the plaintiff telegraphed from Providence to Leonard in Boston, accepting the offer. The defendant did not admit that the offer was made as stated, and made the point that, if it was so made, the contract was not completed by the acceptance until the acceptance reached him in Boston, and that consequently the alleged contract was a Massachusetts contract, and, not being in writing, was invalid under the Massachusetts Statute of Frauds, which was put in proof. The court below ruled the point against the defendant, holding that the contract was completed in Rhode Island by sending the telegram. The defendant cites a few cases which support its position. *McCullough v. Eagle Insurance Co.*, 1 Pick. 278; *British and American Telegraph Co. v. Colson*, L. R. 6 Exch. 108; *Langdell's Cases on Contracts*, §§ 1-18; *Langdell's Summary of Contracts*, §§ 14-16. But the weight of authority strongly supports the instruction given by the court. 1 *Addison on Contracts*, *18, note 1, and cases there cited; *Maclay v. Harvey*, 32 Am. Rep. note on p. 40. This note contains a full report of the recent English case, *Household Fire and Carriage Accident Insurance Co. v. Grant*, L. R. 4 Exch. Div. 216. The case was decided in the Court of Appeal July 1, 1879, by Thessiger and Bagallay, L.JJ., Bramwell, L. J., dissenting. Its doctrine is, that the contract is binding on the proposer as soon as a letter accepting the proposal, properly directed to him, is

¹ Part of the opinion is omitted. — Ed.

posted by the recipient, whether it reaches the proposer or not, if posted without unreasonable delay, and the post is the ordinary and natural mode of transmitting the acceptance. In that case the letter did not reach the proposer, and Bramwell, L. J., who dissented, conceded that, "where a posted letter arrives, the contract is complete on posting." In the case at bar the arrival of the telegram is not disputed. We are of opinion that the contract, if made, was completed in Rhode Island and is a Rhode Island contract, notwithstanding it was to be performed in Massachusetts. *Hunt v. Jones*, 12 R. I. 265. If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that, if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified, is immaterial.

SECTION II.

FORMALITIES.

CLEGG v. LEVY.

NISI PRIUS. 1812.

[Reported 3 Campbell, 166.]

To an action for goods sold and delivered, the principal defence set up was a partnership between the plaintiff and defendant in respect to the goods in question. To prove this, an unstamped agreement was put in, which had been signed by the parties at Surinam. The witness who proved the plaintiff's signature to it, had resided as a merchant in Surinam, and stated that in that colony all agreements must be stamped to be of any validity, and that there is a written law of the colony to this effect.

LORD ELLENBOROUGH. I should clearly hold, that if a stamp was necessary to render this agreement valid in Surinam, it cannot be received in evidence without that stamp here. A contract must be available by the law of the place where it is entered into, or it is void all the world over. But I must have more distinct evidence of the law of Surinam upon this subject than the parol examination of a merchant. The law being in writing, an authenticated copy of it ought to be produced. Although this gentleman supposes that it applies to all agreements, it may possibly contain an exception, like our own stamp act, as to agreements for the sale of goods, wares, and merchandises. In the case of *Bohtlingk v. Inglis*, 3 East, 381, and see 1 East, 515, respecting the right to stop *in transitu* in Russia, Lord Kenyon required the

written law of Russia upon this subject to be given in evidence. I will therefore admit this agreement to be read, unless you prove in the same way that by the law of Surinam a stamp was necessary to give it validity.

The agreement was read accordingly, but did not apply to the goods in question; and the plaintiff had a verdict.¹

SCUDDER v. UNION NATIONAL BANK.

SUPREME COURT OF THE UNITED STATES. 1875.

[Reported 91 *United States*, 406.]

HUNT, J.² Upon the merits, the case is this: The plaintiff below sought to recover from the firm of Henry Ames & Co., of St. Louis, Mo., the amount of a bill of exchange, of which the following is a copy, viz.:—

“CHICAGO, July 7, 1871.

“\$8,125.00.

“Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of

“LELAND & HARBACH.

“To Messrs. Henry Ames & Co., St. Louis, Mo.”

By the direction of Ames & Co., Leland & Harbach had bought for them, and on the seventh day of July, 1871, shipped to them at St. Louis, five hundred barrels of pork, and gave their check on the Union Bank to Hancock, the seller of the same, for \$8,000.

Leland & Harbach then drew the bill in question, and sent the same by their clerk to the Union Bank (the plaintiff below) to be placed to their credit. The bank declined to receive the bill, unless accompanied by the bill of lading or other security. The clerk returned, and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the bank, and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago, and had authorized the drawing of the draft; that it was drawn against five hundred barrels of pork that day bought by Leland & Harbach for them,

¹ If the law of the place of contracting makes an unstamped agreement void, suit cannot be brought upon it in any jurisdiction. *Alves v. Hodgson*, 7 T. R. 241; *Satterthwaite v. Doughty*, Busbee, 314; *Fant v. Miller*, 17 Gratt. 47 (*semble*). But if the agreement by the law of the place of contracting cannot be received in evidence, but is otherwise valid, suit may be brought upon it elsewhere. *Bristow v. Sequeville*, 5 Ex. 275; *Fant v. Miller*, 17 Gratt. 47; *Rennels v. Dearsley*, Pasie. Belge, 1877, 2, 146. The requirement of registration at the place of contracting is treated in the same way. *Ex parte Melbourne*, L. R. 6 Ch. 64. See *Guepratte v. Young*, 4 De G. & Sm. 217. — Ed.

² Part of the opinion only is given. — Ed.

and duly shipped to them. The clerk returned to the bank, and made this statement to its vice-president; who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same, and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds the check given to Hancock for the pork was paid by the bank.

The direction to inform the bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft was made in the presence and in the hearing of Scudder, and without objection by him.

The point was raised in various forms upon the admission of evidence, and by the charge of the judge, whether, upon this state of facts, the firm of Ames & Co., the defendants, were liable to the bank for the amount of the bill. The jury, under the charge of the judge, held them to be liable; and it is from the judgment entered upon that verdict that the present writ of error is brought.

The question is discussed in the appellant's brief, and properly, as if the direction to the clerk had been given by Scudder in person. The jury were authorized to consider the direction in his name, in his presence and hearing, without objection by him, as made by himself.

The objection relied on is, that the transaction amounted at most to a parol promise to accept a bill of exchange then in existence. It is insisted that such a promise does not bind the defendants.

The suit to recover upon the alleged acceptance, or upon the refusal to accept, being in the State of Illinois, and the contract having been made in that State, the judgment is to be given according to the law of that State. The law of the expected place of performance, should there be a difference, yields to the *lex fori* and the *lex loci contractus*.

In Wharton on Conflict of Laws, § 401 *p*, the rule is thus laid down:—

“Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law.”

Miller v. Tiffany, 1 Wall. 310; Chapman v. Robertson, 6 Paige, 634; Andrews v. Pond, 13 Pet. 78; Lamesse v. Baker, 3 Wheat. 147; Adams v. Robertson, 37 Ill. 59; Ferguson v. Fuffe, 8 C. & F. 121; Bain v. Whitehaven and Furness Junction Ry. Co., 3 H. L. Cas. 1; Scott v. Pilkinton, 15 Abb. Pr. 280; Story, Conf. Laws, 203; 10 Wheat. 383.

The rule is often laid down, that the law of the place of performance governs the contract.

Mr. Parsons, in his “Treatise on Notes and Bills,” uses this language: “If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated.” P. 324.

For the purposes of payment, and the incidents of payment, this is

a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance.

The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (*Young v. Harris*, 14 B. Mon. 556; *Parry v. Ainsworth*, 22 Barb. 118), are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.

The same author, however, lays down the rule, that the place of making the contract governs as to the formalities necessary to the validity of the contract. P. 317. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. *Dacosta v. Hatch*, 4 Zab. 319.

So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. *Aymar v. Shelden*, 12 Wend. 439.

So if a note, payable in New York, be given in the State of Illinois for money there lent, reserving ten per cent interest, which is legal in that State, the note is valid, although but seven per cent interest is allowed by the laws of the former State. *Miller v. Tiffany*, 1 Wall. 310; *Depeau v. Humphry*, 20 Mart. 1; *Chapman v. Robertson*, 6 Paige, 634; *Andrews v. Pond*, 13 Pet. 65.

Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

A careful examination of the well-considered decisions of this country and of England will sustain these positions.

There is no statute of the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange: on the contrary, a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the

bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance. *Nelson v. First Nat. Bank*, 48 Ill. 39; *Mason v. Donsay*, 35 Ill. 424; *Jones v. Bank*, 34 Ill. 319.

Unless forbidden by statute, it is the rule of law generally, that a promise to accept an existing bill is an acceptance thereof, whether the promise be in writing or by parol. *Wynne v. Raikes*, 5 East, 514; *Bank of Ireland v. Archer*, 11 M. & W. 383; *How v. Loring*, 24 Pick. 254; *Ward v. Allen*, 2 Met. 53; *Bank v. Woodruff*, 34 Vt. 92; *Spalding v. Andrews*, 12 Wright, 411; *Williams v. Winans*, 2 Green (N. J.), 309; *Storer v. Logan*, 9 Mass. 56; *Byles on Bills*, § 149; *Barney v. Withington*, 37 N. Y. 112. See the Illinois cases cited, *supra*. . .

These principles settle the present case against the appellants.

It certainly does not aid their case, that after assuring the bank, through the message of Leland & Harbach, that the draft was drawn against produce that day shipped to the drawees, and that it was drawn by the authority of the firm (while, in fact, the produce was shipped to and received and sold by them), and that the bank in reliance upon this assurance discounted the bill, Mr. Scudder should at once have telegraphed his firm in St. Louis to delay payment of the draft, and, by a subsequent telegram, should have directed them not to pay it.

*The judgment must be affirmed.*¹

HUNT v. JONES.

SUPREME COURT OF RHODE ISLAND. 1879.

[Reported 12 *Rhode Island*, 265.]

DURFEE, C. J. This is assumpsit for damages for breach of contract. On trial to the jury the plaintiff submitted testimony to show that on 20th of July, 1876, at Providence, in Rhode Island, he sold to the defendant, or entered into an oral agreement with the defendant to sell him, two hundred barrels of Canaan lime at \$1.60 per barrel, to be delivered at the foot of Spring Street in the city of New York, the lime then being in process of manufacture in Canaan, Conn., and that subsequently, in pursuance of the contract, the lime was shipped to and delivered at the foot of Spring Street in New York City, and notice given of its delivery to the defendant, but that the defendant refused to accept it. The lime was afterwards sold at a loss and this action brought to recover damages.

¹ *Acc. Matthews v. Murchison*, 17 Fed. 760; *Mason v. Donsay*, 35 Ill. 424. — Ed.

vidence a statute of the State of New York contract for the sale of any goods, of price of fifty dollars or more, shall be in writing, and the failure to be charged thereby, or unless the contract is in writing, or the evidence, or action, or unless the buyer shall at purchase-money."

And the court to charge the jury, that in the State of New York, its law is to be judged by the law of the place of the contract, and that therefore, the contract being made in Rhode Island, the plaintiff could not recover. The court refused to charge that the plaintiff could recover, notwithstanding the contract being valid in Rhode Island, the place of the contract, and the defendant excepted, and now having returned a verdict against him. Whether the validity of a contract, in contracting, depends on the law of the place where it is to be performed, or the law of the place where it is made, but that the contract in question may be had to the law of Rhode

Island, is a question of authority on the question, *Scudder v. Union National Bank*, 1 Otto, 480. The unanimous judgment of the court, in *Scudder v. Union National Bank*, holds the following language, to the effect that the execution, the interpretation, and the validity of the contract, and the law of the place where it is connected with its performance are to be determined by the law of the place of performance. Matters as to the bringing of suits, admissibility of evidence, and the law of the place where the contract is made, in *Scudder v. Union National Bank*, are not to be determined by the law of the place where the contract is made, in Illinois, where such an acceptance is made, though an acceptance in Minnesota, unless made in writing.

It is to be performed in one State to be performed in another, two *loci contractus*, the *locus celebrationis*; and the law of the former State, and the law of the latter State, and the validity of the contract, that of the State where the contract is made, however, may be valid by the law of the State where it is made, if the *lex fori* does not prohibit, 12 C. B. 201.

The rule thus laid down, considered as a rule for personal contracts, though it is at variance with many *dicta* and decisions, is well supported on authority. *Dacosta v. Davis*, 24 N. J. Law, 319; *Cooper v. Waldegrave*, 2 Beav. 282; *Vidal v. Thompson*, 11 Mart. La. 23; *Aymar v. Sheldon*, 12 Wend. 439; *Chapman v. Robertson*, 6 Paige, 627, 634; *Bain v. Whitehaven, &c. Railway Co.*, 3 H. L. 1; *Van Reimsdyk v. Kane*, 1 Gall. 371; *Wharton, Conflict of Laws*, § 401, p. 676; *Story, Conflict of Laws*, § 234, *seq.*

There are cases which go farther and hold that a contract made in good faith in one State to be performed in another, will be upheld if it conforms to the law of either State. In making such contracts, it is argued, the parties may have in view either the law of the State where the contract is made or the law of the State where it is to be performed; and therefore the contract, if made in good faith without any design to evade the law, ought to be allowed and enforced according to its presumable intent, *ut res magis valeat quam pereat*. This rule has been applied especially to stipulations for interest on contracts for the payment of money, and is commended by Professor Parsons as reasonable and just. *Fisher v. Otis*, 3 Chand. 83; *Depeau v. Humphreys*, 8 Mart. n. s. La. 1; *Cromwell v. County of Sac*, 6 Otto, 51; *Bolton v. Street*, 3 Cold. 31; 2 *Parsons, Contracts*, 583; *Wharton, Conflict of Laws*, § 507.

The case at bar, however, involves the validity of the contract in matter of form rather than of substance, and seems to fall more appropriately under the former rule than the latter; but it is immaterial whether the former or the latter is applied, for the contract in suit is valid under either of them.

We think the charge of the court should be sustained and a new trial denied.

*Petition dismissed.*¹

¹ *Acc. Hubbard v. Exchange Bank*, 72 Fed. 234; *Park Brothers & Co. v. Kelly Axe Mfg. Co.*, 49 Fed. 618; *Houghtaling v. Bell*, 19 Mo. 84; *Dacosta v. Davis*, 4 Zab. 319; 7 *Cinnet*, 480 (*French Cass.* 24 Aug. '80). So of a contract for the sale of real estate, valid where made. *Wolf v. Burke*, 18 Col. 264, 32 Pac. 427; *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111.

Conversely, if the statute of frauds at the place of contracting deprives the contract of validity, it cannot be enforced in another State. *Denny v. Williams*, 5 All. 1; *Allshouse v. Ramsay*, 6 Whart. 331.

On the other hand, if the statute of frauds of the forum goes to the remedy, it will be applied to contracts made elsewhere and valid where made. *Leroux v. Brown*, 12 C. B. 801; *Heaton v. Eldridge*, 56 Oh. S. 87, 46 N. E. 638. — *En.*

HALL v. CORDELL.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 142 United States, 116.]

THE case was stated by the court as follows : —

This was an action of assumpsit. It was based upon an alleged verbal agreement made on or about April 1, 1886, at Marshall, Missouri, between the defendants in error, plaintiffs below, doing business at that place as bankers, under the name of Cordell & Dunnica, and the plaintiffs in error, doing business at the Union Stock Yards, Chicago, Illinois, under the name of Hall Bros. & Co. There was a verdict and judgment in favor of the plaintiffs for \$5,785.79.

The alleged agreement was in substance that Hall Bros. & Co. would accept and pay, or pay on presentation, all drafts made upon them by one George Farlow, in favor of Cordell & Dunnica, for the cost of any live stock bought by Farlow and shipped by him from Missouri to Hall Bros. & Co. at the Union Stock Yards at Chicago.

There was proof before the jury tending to show that, on or about July 13, 1886, Farlow shipped from Missouri nine car-loads of cattle and one car-load of hogs, consigned to Hall Bros. & Co. at the Union Stock Yards, Chicago; that such cattle and hogs were received by the consignees, and by them were sold for account of Farlow; that out of the proceeds they retained the amount of the freight on the shipment, the expenses of feeding the stock on the way and at the stock yards, the charges at the yards and of the persons who came to Chicago with the stock, the commissions of the consignees on the sale, the amount Farlow owed them for moneys paid on other drafts over and above the net proceeds of live stock received and sold for him on the market, and two thousand dollars due from Farlow to Hall Bros. & Co. on certain past-due promissory notes given for money loaned to him; that at the time of the above shipment Farlow, at Marshall, Missouri, the place of agreement, made his draft, of date July 13, 1886, upon Hall Bros. & Co., at the Union Stock Yards, Chicago, in favor of Cordell & Dunnica for \$11,274, the draft stating that it was for the nine car-loads of cattle and one car-load of hogs; that this draft was discounted by Cordell & Dunnica, and the proceeds placed to Farlow's credit on their books; that the proceeds were paid out by the plaintiffs on his checks in favor of the parties from whom he purchased the stock mentioned in the draft, and for the expenses incurred in the shipment; that the draft covered only the cost of the stock to Farlow; that upon its presentation to Hall Bros. & Co. they refused to pay it, and the same was protested for non-payment; and that, subsequently, Cordell & Dunnica received from Hall Bros. & Co. only the sum of \$5,936.55, the balance of the proceeds of the sale of the above cattle and hogs, consigned to them as stated, after deducting the amounts

retained by the consignees, out of such proceeds, on the several accounts above mentioned.

The contract sued upon, having been made in Missouri, the defendant contended that it was invalid under the statutes of that State, which are cited in the opinion of the court, *infra*, and could not be made the basis for a recovery in Illinois. This contention being overruled, the defendant excepted, and (judgment having been given for the plaintiff) sued out this writ of error.¹

HARLAN, J. Our examination must be restricted to the questions of law involved in the rulings of the court below. And the only one which, in our judgment, it is necessary to notice is that arising upon the instructions asked by the defendant, and which the court refused to give, to the effect that the agreement in question, having been made in Missouri, and not having been reduced to writing, was invalid under the statutes of that State, and could not be recognized in Illinois as the basis of an action there against the defendants. . . .

The contention of the plaintiffs in error is that the rights of the parties are to be determined by the law of the place where the alleged agreement was made. If this be so, it may be that the judgment could not be sustained; for the statute of Missouri expressly declares that no person, within that State, shall be charged as an acceptor of a bill of exchange, unless his acceptance be in writing. And the statute, as construed by the highest court of Missouri, equally embraces, within its inhibitions, an action upon a parol promise to accept a bill, except as provided in section 537. *Flato v. Mulhall*, 72 Mo. 522, 526; *Rousch v. Duff*, 35 Mo. 312, 314. But if the law of Missouri governs, this action could not be maintained under that section; because, as held in *Flato v. Mulhall*, above cited, the plaintiffs, being the payees in the bill drawn by Farlow upon Hall Bros. & Co., could not, within the meaning of the statute, be said to have "negotiated" it. The Missouri statute is a copy of a New York statute, in respect to which Judge Duer, in *Blakeston v. Dudley*, 5 Duer, 373, 377, said: "We think, that to negotiate a bill can only mean to transfer it for value, and that it is a solecism to say that a bill has been negotiated by a payee, who has never parted with its ownership or possession. The fact that the plaintiffs had given value for the bill when they received it, only proves its negotiation by the drawer — its negotiation to, and not by them. . . . Their putting their names upon the back of the bill was not an indorsement, but a mere authority to the agent whom they employed, to demand its acceptance and payment. The manifest intention of the legislature in § 10 [similar to § 537 of the Missouri statutes] was to create an exception in favor of those who, having transferred a bill for value, on the faith of the promise of the drawee to accept it, have, in consequence of his refusal to accept, been rendered liable and been subjected to damages, as drawers or indorsers." The plaintiffs in error, therefore, cannot rest their case upon section 537.

¹ Arguments of counsel and part of the opinion are omitted. — Ed.

We are, however, of opinion that, upon principle and authority, the rights of the parties are not to be determined by the law of Missouri. The statute of that State can have no application to an action brought to charge a person in Illinois, upon a parol promise, to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the State of the residence and place of business of the defendants. They were not bound to accept or pay elsewhere than at the place to which, by the terms of the agreement, the stock was to be shipped. Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties. *Coghlan v. South Carolina Railroad Co.*, 142 U. S. 101, and the authorities there cited. In this connection it is well to state that in *New York & Virginia State Stock Bank v. Gibson*, 5 Duer, 574, 583, a case arising under the statute of New York, above referred to, the court said: "Those provisions manifestly embrace all bills, wherever drawn, that are to be accepted and paid within this State, and were the terms of the statute less explicit than they are, the general rule of law would lead us to the same conclusion: that the validity of a promise to accept a bill of exchange depends upon the law of the place where the bill is to be accepted and paid," citing *Boyce v. Edwards*, 4 Pet. 111.

Looking, then, at the law of Illinois, there is no difficulty in holding that the defendants were liable for a breach of their parol agreement, made in Missouri, to accept and pay, or to pay upon presentation, in Illinois, the bills drawn by Farlow, pursuant to that agreement, in favor of the plaintiffs. It was held in *Scudder v. Union National Bank*, 91 U. S. 406, 418, that, in Illinois, a parol acceptance of, or a parol promise to accept, upon a sufficient consideration, a bill of exchange, was binding on the acceptor. *Mason v. Donsay*, 35 Ill. 424, 433; *Nelson v. First Nat. Bank of Chicago*, 48 Ill. 36, 40; *Sturgis v. Fourth National Bank of Chicago*, 75 Ill. 595; *St. Louis National Stock Yards v. O'Reilly*, 85 Ill. 546, 551.

The views we have expressed were substantially those upon which the court below proceeded in its refusal of the defendants' requests for instructions, as well as in its charge to the jury. The suggestion that there was a material variance between the averments of the original and amended declaration, and the proof adduced by the plaintiffs, is without foundation. The real issue was fairly submitted to the jury, and their verdict must stand.

Judgment affirmed.

MR. JUSTICE GRAY was not present at the argument and did not participate in the decision.¹

¹ *Acc. Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959. — *Ed.*

SECTION III

OBLIGATION.

ROBINSON v. BLAND.

KING'S BENCH. 1760.

[*Reported 2 Burrow, 1077.*]

THIS was a case reserved at Nisi Prius at Westminster Hall, before Lord MANSFIELD, 22d May, 1760.

The action was an action upon the case upon several promises, and the declaration contained three counts. The first count was upon a bill of exchange, drawn at Paris by the intestate, Sir John Bland, on the 31st of August, 1755, and bearing that same date, on himself, in England, for the sum of £672 sterling, payable to the order of the plaintiff ten days after sight, value received and accepted by the said Sir John Bland. The second count was for £700, moneys lent and advanced by the said plaintiff to the said Sir John Bland, at his request. The third count was for £700, moneys had and received by the said Sir John Bland, to and for the use of the plaintiff. And the plaintiff's damage is laid at £800.

The defendant pleaded the general issue, "That Sir John Bland did not undertake and promise," etc., and issue was joined thereon.

The verdict was found for the plaintiff, and £672 given for damages, subject to the following case stated for the opinion of the court, on the following facts proved and admitted, viz. :

That the bill of exchange was given at Paris for £300 there lent by the plaintiff to Sir John Bland, at the time and place of play; and for £372 more lost at the same time and place, by Sir John Bland, to the plaintiff, at play.

That the play was very fair; and there is not any imputation whatsoever on the plaintiff's behavior.

That there were several gentlemen and persons of fashion then and there at play, besides the plaintiff and Sir John Bland.

That in France, money lost at play, between gentlemen, may be recovered, as a debt of honor, before the marshals of France, who can enforce obedience to their sentences by imprisonment; though such money is not recoverable in the ordinary course of justice.

That money lent to play with, or at the time and place of play, may be recovered there, as a debt, in the ordinary course of justice, there being no positive law against it.

That Sir John Bland was, and the plaintiff is, a gentleman.

The question was, Whether, under these circumstances, the plaintiff is entitled to recover anything, and what, against the defendant?

It was first argued on Tuesday, 17th June last, by Mr. Serj. *Hewitt* for the plaintiff, and Mr. *Blackstone* for the defendant; and again, yesterday and to-day, by Mr. *Wedderburn* for the plaintiff, and Mr. *Coze* for the defendant.

Upon the conclusion of this second argument,

Lord MANSFIELD said, that in the present case, the facts stated scarce leave room for any question; because the law of France and of England is the same.

The first question is, Whether the plaintiff is entitled to recover upon this bill of exchange, by force of the writing.

The second question is, Whether he is entitled to recover upon the original consideration and contract, by the justice and equity of his case, exclusive of any assistance from the bill of exchange, and taking that to be a void security.

As to the first question, the defendant has objected: "That the consideration of the bill of exchange is wholly money won and lent at play. Therefore, by force of the writing, the plaintiff cannot by the law of England recover, such security being utterly void." And, no doubt, the law of England is so.

There are three reasons why the plaintiff cannot recover here, upon this bill of exchange.

First, The parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. Huberi Prælectiones, lib. 1, tit. 3, p. 84, is clear and distinct: "Veruntamen, etc. locus in quo contractus, etc. potius considerand', etc. se obligavit." Voet speaks to the same effect.

Now here, the payment is to be in England; it is an English security, and so intended by the parties.

Second reason: Mr. *Coze* has argued very rightly: "That Sir John Bland could never be called upon abroad for payment of this bill, till there had been a wilful default of payment in England." The bill was drawn by Sir John Bland, on himself, in England, payable ten days after sight.

In every disposition or contract where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of lands, a mortgage, a contract concerning stocks, must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here.

Third reason: The case don't leave room for a question. For the law of both countries is the same. The consideration of the bill of exchange might, in an action upon it, be gone into there as well as here. And as to the money won at play, it could not be recovered in any court of justice there, notwithstanding the bill of exchange.

This writing is, as a security, void (being for a gaming debt), both in France and in England. We may therefore lay the bill of exchange out of the case: it is very clear the plaintiff cannot recover upon that count.

Second question. Then as to the other counts, for money had and received to the plaintiff's use, and for money lent and advanced to him. — Consider it distinctly, as to each part: the money won, and the money lent.

First, As to the money won. By the rule of the law of England, no action can be maintained for it.

To this it has been objected, "That the contract was made in France. Therefore, *ex comitate*, the law of France must prevail, and be the rule of determination."

I admit, that there are many cases where the law of the place of the transaction shall be the rule; and the law of England is as liberal in this respect as other laws are. This is a large field, and not necessary now to be gone into.

It has been laid down at the bar, "That a marriage in a foreign country must be governed by the law of that country where the marriage was had;" which, in general, is true. But the marriages in Scotland, of persons going from hence for that purpose, were instanced by way of example. They may come under a very different consideration, according to the opinion of Huberus, p. 33, and other writers.

No such case has yet been litigated in England, except one, of a marriage at Ostend, which came before Lord Hardwicke, who ordered it to be tried in the Ecclesiastical Court; but the young man came of age, and the parties were married over again; and so the matter was never brought to a trial.

The point that the plaintiff must rest upon in the present case is this: "The money was won in France; therefore it ought to be governed by the law of France; and it is recoverable there before the marshals of France, who can enforce obedience to their sentence."

The Parliament of Paris would pay no regard to their judgment, nor carry it into execution. The marshals of France proceed personally against gentlemen, as to points of honor, with a view to prevent duelling.

They could not have taken cognizance of the present matter. It was not within their jurisdiction. It was no breach of honor in France, for the money was payable in England; and Sir John Bland could not be said to have forfeited his honor till the ten days were out, and till the money had been demanded in England, and payment refused there. Sir John Bland was actually dead in a very short time after he gave the note. The marshals of France can only proceed personally against the gentleman who loses the money, but have no power over his estate or representatives, after his death.

Therefore, as to the money won, the contract is to be considered as void by the law of France, as well as by the law of England; which

makes it unnecessary to consider "how far the law of France ought to be regarded."

Next, as to the money lent. The sense of the legislature seems to me to be agreeable to the cases that have been cited.

The act of 16 C. 2, c. 7, § 3, does not meddle with money lent at play. But, as to money (exceeding £100), lost, and not paid down at the time of losing it, it says, "That the loser shall not be compellable to make it good; but the contract and contracts for the same and for every part thereof, and all securities, shall be utterly void, etc." The words "contract and contracts for the same" are not in 9 Anne, and I dare say were designedly left out: it only says, "That all notes, bills, bonds, judgments, mortgages, or other securities, etc., for money won or lent at play, shall be utterly void," etc.

Here the money was fairly lent, without any imputation whatsoever. Sir John Bland, the borrower of it, being in a foreign country, might very naturally have been distressed, under his then situation amongst foreigners, for want of having ready money, or knowing how to procure it; and it might be even a kind and generous and commendable act to lend it to him at that time, to extricate him from his difficulties, as he was then circumstanced. The jury have left it quite open to the court to determine "whether anything, and what, is recoverable." As to the money won, we think it cannot be recovered; as to the money lent, the plaintiff is entitled to it, both by the law of England and by the law of France.

Interest will be payable upon this bill after the expiration of the ten days. The question will be, "How far the interest ought to be carried down." It is generally said, "to the day of the writ brought;" i. e. of commencing the action. But I do not see why it should not be carried further; it is equally reasonable, it is the right of the party, to have it to the last act of the court ascertaining the sum due.

I have long wished for an opportunity to have this point considered by the court; because I would not take it upon myself at *Nisi Prius*, to change what has commonly been the practice.

But, as to this last point, we will think of it for a day or two.

Mr. Justice DENISON gave no opinion now, on this last point. As to the rest, he said, it is a plain, clear, short case; it is determinable by the rules of the common law, and no other law.

The money is made payable in England. As it is a foreign bill of exchange, it must of course be dated abroad; but it is to be paid here at home. And the plaintiff has appealed to the laws of England by bringing his action here, and ought to be determined by them.

But, by the laws of England, the security is void; which might have been pleaded, as well as it might be given in evidence; and the defendant needed not, in his plea, to have said where it was won at play. And being a transitory action, it must then have been tried where the action was brought; and so it must have been, if the plea had been local. Indeed, in many cases that might be put, the determination

Law forum

must have been according to the laws of the place where the fact arose. But the present case is not so; here, the security is void by the laws of the country where he brings his action upon it. And this security is one entire security both for the money won at play, and the money lent at play.

There is a distinction between the contract and the security. If part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security; that being entire, is bad for the whole.

Therefore the plaintiff ought to be barred of this action upon this bill of exchange, as being a void security by the laws of this country where he brings his action. But still the contract remains; and he has a right to maintain his action for so much of his demand as is legal, which is the money lent.

As to the time of carrying down the interest, it may be proper to consider of it a little while.

Mr. Justice WILMOT. Here are two sums demanded, which are blended together in one bill of exchange, but are divisible in their nature.

As to the money lent. The cases that have been cited are in point "that it is recoverable." But if there were none, yet I should be clear that the plaintiff may maintain an action for that.

As to contracts being good, and the security void: The contract may certainly be good, though the security be void; and I think that this contract is good, though the security is void, by the statute of 9 Anne. This is not stated to be money lent to play with, or for the purpose of play; but "lent at the time and place of play" only; nothing appears upon this case to induce any suspicion that it was lent for any bad purpose.

The statutes meant to prevent excessive gaming, and to vacate all securities whatsoever for money won at play; and the genuine, true, and sound construction of 9 Anne is to understand it as intended to prevent any securities being taken for money won at play, or lent to play with, when the borrower had lost all his ready cash; but not to make the contract itself void, where the money is fairly and *bona fide* lent, though at the time and place of play.

As to the interest that shall be given to the plaintiff upon the sum lent, in the assessment of the damages: This is an action that sounds in damages; and the true measure undoubtedly is the damage which the plaintiff sustains by the non-performance of the contract; and that damage is the whole interest due upon the sum lent; viz. from the time of its being payable, up to the time of signing the judgment. Nay, even then he may suffer; he may still be kept out of his money, by writ of error, for a still further time. According to my memory, Lord Coke's exposition of the statute is, that the "costs of the writ" shall extend to all the legal costs of the suit.

The present case, notwithstanding the questions that have been agi-

tated in arguing it, comes out to be no case at all, no point at all, no law at all.

Indeed, "Whether an action can be supported in England, on a contract which is void by the law of England, but valid by the law of the country where the matter was transacted," is a great question (though I should have no great doubt about that). But that case does not exist here: for it is not here stated, "that such a debt as this, for money won at play in France, is recoverable in the ordinary courts of justice there," but quite the contrary. So that the laws of France and of England are the same as to the money won: the contract is void as to that, by the laws of both countries.

And as to this wild, illegal, fantastical court of honor, the court of the marshals of France, acting only *in personam*, contrary to the universal and general laws even of the country where the transaction happened, and contrary to the genius and spirit of our own law too; it would be absurd to suppose that the bare possible accidental chance of a recovery in that court should be a foundation for maintaining an action here, upon a matter prohibited by the laws of both countries.

Besides, Sir John Bland himself, as it seems, was not, and the present defendant, the person now before this court, could never have been the object of the jurisdiction of that court. The remedy there, in its utmost extent, was only *in personam*; and this defendant is an administratrix only.

A strong reason for the plaintiff's recovering in this action the money lent is, that the bill of exchange is payable in England; and therefore it shall be determined according to the laws of England, where it is payable. As in the case of *Sir John Champant v. Ld. Ranelagh*, Mich. 1700, in Chancery (reported in *Precedents in Chancery*, 128). A bond was made in England, and sent over to Ireland, and the money to be paid there; but it was not mentioned what interest should be paid: my Lord Keeper was of opinion, "that it should carry Irish interest." Therefore, as this money was payable in England, the law of England must be the rule of recovering it.

I give no opinion as to the other point: yet I cannot help thinking, that where a person appeals to the law of England, he must take his remedy according to the law of England, to which he has appealed.

There is no difference, in this case, between the statute law and the common law of England; a contract cannot be maintained upon the one that is void by the other.

The law of the place where the thing happens does not always prevail. In many countries, a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose an action to be brought here, upon such a contract which arose in such a country: but that would never be allowed in this country. Therefore the *lex loci* cannot in all cases govern and direct.

The sentences of foreign courts have always some degree of regard paid to them by the courts of justice here; and it is very right that

Ad by both laws

Place of France

an attention should be paid to them, as far as they ought to have weight in the case depending.

But if a man originally appeals to the law of England for redress, he must take his redress according to that law to which he has appealed for such redress. Therefore, if this rule of determination was different, by the law of France, from our rule here, yet I should incline, that the law of England, where the action was brought, should prevail against the law of France, if they did really clash with each other; because the party seeking redress has chosen to apply here. But I give no opinion at all on this point.

As to the money lent: There can be no doubt; because there is no law either in England or France that hinders the plaintiff from maintaining his action for it.

IN RE MISSOURI STEAMSHIP COMPANY.

CHANCERY DIVISION: COURT OF APPEAL. 1888: 1889.

[*Reported 42 Chancery Division, 321.*]

CHITTY, J. This is a claim by Mr. Munroe against the Missouri Steamship Company, Limited. for damages for loss of his cattle. Mr. Munroe is a citizen of the United States domiciled there. The company is an English company incorporated according to English law, domiciled in England, and now in voluntary liquidation. The contracts were made at Boston, Massachusetts, where the company had an agent by whom the contracts were entered into on their part. The ship on which the goods were to be carried was the Missouri, a British ship, and one of a line of steamships trading regularly between Boston and Liverpool. The contracts were for the carriage of the cattle from Boston to Liverpool, and they contained express stipulations exempting the shipowners from liability for loss or damage arising from negligence of the master or crew, and they provided that bills of lading should be given containing stipulations to the same effect. The company's agent had no authority to bind the company by any contract not containing such stipulations as those which were actually inserted. The cattle were shipped on board at Boston, and bills of lading were given and accepted there in conformity with the contracts. The ship sailed and was stranded on the Welsh coast. It is admitted for the purposes of the present case that the stranding occurred through the negligence of the master and crew. In these circumstances it is clear, as admitted by the claimant's counsel, that he is not entitled to recover if these stipulations, exempting the shipowners from liability arising from the negligence of their servants, are valid. But it is contended for the claimant that the stipulations are invalid according to the law

were the contracts were in fact made and accepted.

It is before me as to the present state of the subject. According to that law the ground upon which the decision is based is that the consequences of the negligence are considered to be extorted by the law in the part of the person sending the cargo contrary to public policy. In the case of the "Montana", these principles were held to be applicable to the loss of cattle on board a British ship. The facts were substantially the same.

The law in the United States is now to be finally settled. The question is before the Court in the case of "The Montana". The Supreme Court has given leave to show what is the English law. It has been concluded and the judgment is given. I am unable to ascertain that the law is in favor of the shipowner on the point. The law must fail.

The question on the assumption that the stipulations are void. The law of England or the law of the United States to the stipulations which purport to be for negligence.

That the question, being a question as to the contracts, ought to be determined by the law of the country to which the ship belongs. The contracts and the bills of lading are to be treated separately.

As to the formal validity of the contracts, the claimant does not go to the contract as a whole. So far as the contracts are valid according to the law of the country, it relates to all matters of substance. If the stipulations attached had not been valid to the law of both countries, they would be impeached on the ground that they are of a moral nature, or such as ought not to be enforced in civilized countries; they are im-

peached solely on the ground that they are void, as being disallowed by the law of the place where the contracts were made, which law considers them contrary to its own views of the public policy that ought to prevail within the limits of its own territorial jurisdiction. Although the law of Massachusetts would in the case of a contract made in Massachusetts by a common carrier for the carriage of goods wholly within the territories of the State hold these stipulations void, I cannot find any sufficient reason for saying it would hold them void in the case of a contract made within the State for the carriage of goods where the performance of the contract was (as in the case before me) to take place mainly outside the State, if it were declared expressly on the face of the contract that for all purposes the contract was to be governed by the law of the country to which the ship belonged, and the law of such country allowed the stipulations to be valid. In other words, I apprehend that the law of Massachusetts would not prohibit the parties to such a contract from contracting expressly with a view to the law of England. See Lord Mansfield's judgment in *Robinson v. Bland*, 2 Burr. 1078, and Story's *Conflict of Laws*, pp. 280, 281.

The contracts before me do not contain any such express declaration. But I have examined and endeavored to ascertain the precise nature of the objections raised, with this result, as it appears to me, that it was within the competence of the parties according to the law of both countries to enter into the contracts.

Two cases of high authority were relied upon by the company's counsel in support of their contention: *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, and *Peninsular and Oriental Steam Navigation Company v. Shand*, 3 Moo. P. C. (N.S.) 272. The actual decisions in those cases may not precisely govern the present case, but the question is whether the principle upon which those decisions are based does not apply.

It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention.

Numerous instances of the exceptions are to be found in the books. A different intention, that is an intention to be bound by some other law than the law of the place where the contract is made, may be inferred from the subject-matter of the contract and from the surrounding circumstances, so far as they are relevant to determine the character of the contract. See the judgment of Mr. Justice Willes in *Lloyd v. Guibert*, Law Rep. 1 Q. B. 122, 123. The terms and stipulations found in the contract itself are matters of importance to be taken into consideration as to the true inference to be drawn. The general principle by which the Court of Exchequer was guided in the solution of the question as to what law ought to prevail was that the rights of the parties to a contract are to be judged of by that law

by which they intended, or rather by which they may justly be presumed to have intended, to bind themselves, and by the steady application of that principle the court arrived at the conclusion that where the contract of affreightment does not provide otherwise than as between the parties to such contract in respect of sea-damage and its incidents, the law of the ship should govern. In that case the ship was a French ship, the contract was made at a Danish West-Indian port, and the goods were shipped to Hayti to be delivered at Havre, London, or Liverpool, at the charterer's option. The court held that the law of France applied, whereby the shipowners on abandonment of the ship and freight were exempt from any liability to the owner of the cargo, and rejected the law of Denmark and the various other countries put forward on behalf of the owners of the cargo. In the course of the judgment the various places in which the contract was to be performed were pointed out; but in adopting the French law the court relied on the subject-matter of the contract, the employment of a sea-going vessel for a service the greater and more onerous part of which was to be rendered on the high seas, where for all purposes of jurisdiction, criminal and civil, with respect to all persons, things, and transactions on board, she was, as it were, a floating island, over which France had as absolute, and for all purposes of peace as exclusive, a sovereignty as over her dominions by land, and which even when in a foreign port was never completely removed from French jurisdiction. These practical considerations formed the main ground of the judgment. The court declined to enter into any question as to the policy of the French law.

I have referred somewhat fully to this judgment in order to show that the principle upon which it proceeds is not confined to the particular facts of that case, but is applicable and ought to be applied not merely to questions of construction and the rights incidental to, or arising out of, the contract of affreightment, but to questions as to the validity of stipulations in the contract itself. Any distinctions founded on the difference of these questions were not rested on substantial ground, and would lead to uncertainty and confusion in mercantile transactions of this character. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, namely, that of the flag; and so to hold is to adopt a simple, natural, and consistent rule. Westlake's *Private International Law*, 2d ed. p. 201.

In *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, there were no express stipulations pointing to the law of the country rather than to the law of some other country, but in *Peninsular and Oriental Steam Navigation Company v. Shand*, 3 Moo. P. C. (N. S.) 272, where also it was held that the contract was governed by the law of the flag, there were such stipulations, and Lord Justice Turner, in delivering the judgment of the Privy Council, inquired into the actual intention of the contracting parties as disclosed on the face of the contract. In that case the

contract was made between British subjects in England substantially for safe carriage from Southampton to Mauritius. The performance was to commence in an English vessel in an English port, to be continued in vessels which, for this purpose, carried their country with them, to be fully completed in Mauritius, but liable to breach, partial or entire, in several other countries in which the vessel might be in the course of the voyage. Into this contract there was introduced a stipulation professing to limit the liability of the shipowner, which stipulation was valid according to the law of England, but invalid according to the law of Mauritius. In discussing the intention of the parties the Lord Justice asked, in substance, whether it was contended that the stipulation should be construed according to the English law, which would give effect to it, or according to the French law, or some other law, which would give no effect to it, and he held that the actual intention of the parties must be taken clearly to have been to treat the contract as an English contract, to be interpreted according to English law, and that there was no rule of general law or policy setting up a contrary presumption, and consequently that the court below was wrong in not governing itself according to those rules. Now the difference in fact between that case and the present is that in that case the parties were both British subjects, and the contract was made in England, whereas in the present case one only of the parties is English, and the contract was made in Boston. But these differences, though proper to be taken into consideration on the general question, have little or no bearing on the question of the intention of the parties to be inferred from the particular stipulations.

In determining a question between contracting parties (to quote from the judgment in *Lloyd v. Guibert*, Law Rep. 1 Q. B. 120), recourse must first be had to the language of the contract itself, and, force, fraud, and mistake apart, the true construction of the language of the contract is the touchstone of legal right. The circumstance that the stipulations which the claimant asks to have struck out of the contracts are allowed by the law of one country and disallowed by the law of the other country, affords a cogent reason for holding that the parties were contracting with reference to the law of the country which allowed and not to the law which disallowed the stipulations. It is unreasonable to presume that the parties inserted in the contracts stipulations which they intended should be nugatory and void. But on the facts of this case a more limited proposition may be adopted. The loss occurred through the negligence of the shipowner's servants within the territorial waters, not of Massachusetts, but of Wales, that is, of a country where English law prevails. Conceding that it would be possible (without saying it would be reasonable) to presume that the parties contracted with reference to the law of Massachusetts in respect of any loss by negligence occurring within the territorial waters of that State, it appears to me that it would be unreasonable to presume that they contracted with reference to the law of that State in

respect of a loss by negligence occurring outside the limits of that State.

I hold, then, that the stipulations are valid, first, on the general ground that the contracts are governed by the law of the flag, and secondly, on the particular ground that from the special provisions of the contracts themselves it appears the parties were contracting with a view to the law of England.

From this judgment the claimant appealed.

The appeal came on to be heard on the 20th of June, 1888, but the hearing stood over to await the decision of the Montana Case in the Supreme Court of the United States.

The case came on again on the 1st of May, 1889, when a printed copy of the judgment in the Montana Case was produced to the court, from which it appeared that the stipulation in question was held by the Supreme Court to be void as being contrary to public policy.¹

Fry, L. J. The principles on which this case has to be decided have been familiar to the courts at any rate since the time of Lord Mansfield, who in the case of *Robinson v. Bland*, 2 Burr. 1077, expounded those principles of law, and they have been clearly stated since in many cases, among others in the well-known case of *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, 122, where the learned Judge, who delivered the judgment of the Exchequer Chamber, said: "It is, however, generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance," — and he goes on to enumerate instances from which the courts have gleaned a different intention. That view of the law was fully adopted in the case of *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589, in this court.

I think, therefore, the general principle on which we have to proceed is one which admits of no doubt; and the inquiry, therefore, is this: looking at the subject-matter of this contract, the place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract? By that I mean to determine its validity and its interpretation.

Now, in the first place, the ship was an English ship; the owners were an English company; England was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place; and, what is still more important, the forms of the contract and the bills of lading were English forms. According to the law of England, the contract would be good in the terms in which it stood; whereas according to the law of the United

¹ Arguments of counsel and the concurring opinions of Lord HALSBURY, L. C., and CORTON, L. J., are omitted. — Ed.

States important terms of the contract would be excluded from it. That is, to my mind, a very cogent consideration to show that what must be presumed to have been the intent of the parties was this : that the law which would make the contract valid in all particulars was the law to regulate the conduct of the parties. Looking at all the circumstances of the case, I have no doubt that that is the conclusion which we ought to arrive at.

In coming to that conclusion, and in stating those principles, I am glad to find that I am in entire accordance with the law laid down in the American courts. It appears to me that the passages cited from Mr. Justice Story are strong in favor of the principle to which I have referred, and in the case of "The Montana" that rule was adopted in express terms by the Supreme Court of the United States. Lord Justice Cotton has read one passage from that judgment, and I will read another: "This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view;" and in that very case, in accordance with the principle so laid down, the Supreme Court proceeded to inquire whether there were any circumstances from which they ought to presume any other law than that of the place where the contract was made to have been presumed by the parties. Therefore, it is obvious in adopting the principles which I have stated we are proceeding not only according to the English law, but also according to the law of America. It is very desirable, if possible, that the law relating to the interchange of comity between nations should be the same.

There was only one other argument put forward to which I need refer, and it seemed to me to be a little halting between two statements. Sir Walter Phillimore laid down a proposition to this effect, that whenever the law of the place where the contract is made prohibits a particular stipulation in a contract no other country can treat that stipulation as valid. If by the word "prohibit" he means that the law of the United States has in terms prohibited or has rendered illegal or criminal the introduction of this stipulation, it appears to me that the decision in the Montana Case shows that that is not the law of the United States. That decision, I think, when fairly read, shows what one would expect to be the case, namely, that the courts have held that this stipulation being obnoxious to their public policy is void, not illegal, exactly in the same way as in this country we hold that stipulations which are in restraint of trade are not illegal, and that the entering into them does not constitute an illegal conspiracy, but they are void. If, on the other hand, it be argued that where the law of the place of the contract refuses to enforce a stipulation, then no other country will enforce that stipulation, we have a proposition which on

the face of it appears to me to be untenable. Therefore, whichever is the alternative of the proposition which Sir Walter Phillimore adopts, neither of them will support his case.

I think, therefore, the decision of Mr. Justice Chitty was correct, and that this appeal fails.¹

PRITCHARD v. NORTON. ✓

SUPREME COURT OF THE UNITED STATES. 1882.

[Reported 106 *United States*, 124.]

ERROR to the Circuit Court of the United States for the District of Louisiana. This action was brought by Eliza D. Pritchard, a citizen of Louisiana, executrix of Richard Pritchard, deceased, against Norton, a citizen of New York, upon a bond made in New York by said Norton and another, conditioned to indemnify Pritchard against loss arising from his liability on an appeal bond already given by them as principals and signed by Pritchard as surety in Louisiana. Pritchard was called upon to pay money upon the appeal bond. The defendant set up by way of defence, that the bond sued on was executed and delivered by him to Pritchard in the State of New York, and without any consideration therefor, and that by the laws of that State it was void, by reason thereof. The court so ruled; the plaintiff excepted to the ruling, and now assigns the exception as error.²

MATTHEWS, J. It is claimed on behalf of the plaintiff that by the law of Louisiana the pre-existing liability of Pritchard as surety for the railroad company would be a valid consideration to support the promise of indemnity, notwithstanding his liability had been incurred without any previous request from the defendant. This claim is not controverted, and is fully supported by the citations from the Civil Code of Louisiana of 1870, art. 1893-1960, and the decisions of the Supreme Court of that State. *Flood v. Thomas*, 5 Mart. N. S. (La.) 560; *N. O. Gas. Co. v. Paulding*, 12 Rob. (La.) 378; *N. O. & Carrollton Railroad Co. v. Chapman*, 8 La. Ann. 97; *Keane v. Goldsmith, Haber & Co.*, 12 La. Ann. 560. In the case last mentioned it is said that "the contract is, in its nature, one of personal warranty, recognized by articles 378 and 379 of the Code of Practice." And it was there held that a right of action upon the bond of indemnity accrued to the obligee; when his liability became fixed as surety by a final judgment, without payment on his part, it being the obligation of the defendants upon the bond of indemnity to pay the judgment rendered against him, or to furnish him the money with which to pay it.

¹ *Acc. South African Breweries v. King*, [1899] 2 Ch. 173, [1900] 1 Ch. 273. — **ED.**

² This statement of the case is substituted for that of the Reporter. Arguments of counsel and part of the opinion are omitted. — **ED.**

The single question presented by the record, therefore, is whether the law of New York or that of Louisiana defines and fixes the rights and obligations of the parties. If the former applies, the judgment of the court below is correct; if the latter, it is erroneous.

The argument in support of the judgment is simple, and may be briefly stated. It is, that New York is the place of the contract, both because it was executed and delivered there, and because no other place of performance being either designated or necessarily implied, it was to be performed there; wherefore the law of New York, as the *lex loci contractus*, in both senses, being *lex loci celebrationis* and *lex loci solutionis*, must apply to determine not only the form of the contract, but also its validity.

On the other hand, the application of the law of Louisiana may be considered in two aspects: as the *lex fori*, the suit having been brought in a court exercising jurisdiction within its territory and administering its laws; and as the *lex loci solutionis*, the obligation of the bond of indemnity being to place the fund for payment in the hands of the surety, or to repay him the amount of his advance, in the place where he was bound to discharge his own liability.

It will be convenient to consider the applicability of the law of Louisiana, first, as the *lex fori*, and then as the *lex loci solutionis*.

1. The *lex fori*.

The court below, in a cause like the present, in which its jurisdiction depends on the citizenship of the parties, adjudicates their rights precisely as should a tribunal of the State of Louisiana according to her laws: so that, in that sense, there is no question as to what law must be administered. But, in case of contract, the foreign law may, by the act and will of the parties, have become part of their agreement: and, in enforcing this, the law of the forum may find it necessary to give effect to a foreign law, which, without such adoption, would have no force beyond its own territory.

This, upon the principle of comity, for the purpose of promoting and facilitating international intercourse, and within limits fixed by its own public policy, a civilized State is accustomed and considers itself bound to do: but, in doing so, nevertheless adheres to its own system of formal judicial procedure and remedies. And thus the distinction is at once established between the law of the contract, which may be foreign, and the law of the procedure and remedy, which must be domestic and local. In respect to the latter the foreign law is rejected: but how and where to draw the line of precise classification it is not always easy to determine.

The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract. . . .

The question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, is not one of procedure and remedy. It goes to the substance of the right itself, and belongs to the constitution of the contract. The difference between the law of Louisiana and that of New York, presented in this case, is radical, and gives rise to the inquiry, what, according to each, are the essential elements of a valid contract, determinable only by the law of its seat; and not that other, what remedy is provided by the law of the place where the suit has been brought to recover for the breach of its obligation.

On this point, what was said in *The Gaetano & Maria*, 7 P. D. 137, is pertinent. In that case the question was whether the English law, which was the law of the forum, or the Italian law, which was the law of the flag, should prevail, as to the validity of a hypothecation of the cargo by the master of a ship. It was claimed that because the matter to be proved was, whether there was a necessity which justified it, it thereby became a matter of procedure, as being a matter of evidence. Lord Justice Brett said: "Now, the manner of proving the facts is matter of evidence, and, to my mind, is matter of procedure, but the facts to be proved are not matters of procedure; they are matters with which the procedure has to deal."

It becomes necessary, therefore, to consider the applicability of the law of Louisiana as —

2. The *lex loci solutionis*.

The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 48, where he defined it as a principle of universal law, — "The principle that in every forum a contract is governed by the law with a view to which it was made." The same idea had been expressed by Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1077, 1078. "The law of the place," he said, "can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." And in *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that "it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter." *Le Breton v. Miles*, 8 Paige (N. Y.), 261.

It is upon this ground that the presumption rests, that the contract

is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

So, Phillimore says: "It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfilment, — whether that place be fixed by express words or by tacit implication — as the place to the jurisdiction of which the contracting parties elected to submit themselves." 4 Int. Law, 469.

The same author concludes his discussion of the particular topic as follows; "As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted, either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements." 4 Int. Law, § 654, pp. 470, 471.

This rule, if universally applicable, which perhaps it is not, though founded on the maxim, *ut res magis valeat quam pereat*, would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.

At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent.

It was expressly referred to as a decisive principle in *Bell v. Packard*, 69 Me. 105, although it cannot be regarded as the foundation of the judgment in that case. *Milliken v. Pratt*, 125 Mass. 374.

If now we examine the terms of the bond of indemnity, and the situation and relation of the parties, we shall find conclusive corroboration of the presumption, that the obligation was entered into in view of the laws of Louisiana.

The antecedent liability of Pritchard, as surety for the railroad company on the appeal bond, was confessedly contracted in that State, according to its laws, and it was there alone that it could be performed and discharged. Its undertaking was, that Pritchard should, in certain contingencies, satisfy a judgment of its courts. That could be done only within its territory and according to its laws. The condition of the obligation, which is the basis of this action, is, that McComb and Norton, the obligors, shall hold harmless and fully indemnify Pritchard against all loss or damage arising from his liability as surety on the appeal bond. A judgment was, in fact, rendered against him on it in Louisiana. There was but one way in which the obligors in the indemnity bond could perfectly satisfy its warranty. That was, the moment the judgment was rendered against Pritchard on the appeal bond, to come forward in his stead, and, by payment, to extinguish it. He was entitled to demand this before any payment by himself, and to

require that the fund should be forthcoming at the place where otherwise he could be required to pay it. Even if it should be thought that Pritchard was bound to pay the judgment recovered against himself, before his right of recourse accrued upon the bond of indemnity, nevertheless he was entitled to be reimbursed the amount of his advance at the same place where he had been required to make it. So that it is clear, beyond any doubt, that the obligation of the indemnity was to be fulfilled in Louisiana, and, consequently, is subject, in all matters affecting its construction and validity, to the law of that locality.

This construction is abundantly sustained by the authority of judicial decisions in similar cases.

In *Irvine v. Barrett*, 2 Grant's (Pa.) Cas. 73, it was decided that where a security is given in pursuance of a decree of a court of justice, it is to be construed according to the intention of the tribunal which directed its execution, and, in contemplation of law, is to be performed at the place where the court exercises its jurisdiction; and that a bond given in another State, as collateral to such an obligation, is controlled by the same law which controls the principal indebtedness. In the case of *Penobscot & Kennebec Railroad Co. v. Bartlett*, 12 Gray (Mass.), 244, the Supreme Judicial Court of Massachusetts decided that a contract made in that State to subscribe to shares in the capital stock of a railroad corporation established by the laws of another State, and having their road and treasury there, is a contract to be performed there, and is to be construed by the laws of that State. In *Lanusse v. Barker*, 3 Wheat. 110, 146, this court declared that "where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place."

The case of *Cox v. United States*, 6 Pet. 172, was an action upon the official bond of a navy agent. The sureties contended that the United States were bound to divide their action, and take judgment against each surety only for his proportion of the sum due, according to the laws of Louisiana, considering it a contract made there, and to be governed in this respect by the law of that State. The court, however, said: "But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the Treasury Department at the seat of government; and the navy agent is bound by the very terms of the bond to pay over such sum as may be found due to the United States

on such settlement; and such paying over must be to the Treasury Department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington, and the liability of the parties must be governed by the rules of the common law." This decision was repeated in *Duncan v. United States*, 7 Pet. 435.

These cases were relied on by the Supreme Court of New York in *Commonwealth of Kentucky v. Bassford*, 6 Hill (N. Y.), 526. That was an action upon a bond executed in New York conditioned for the faithful performance of the duties enjoined by a law of Kentucky authorizing the obligees to sell lottery tickets for the benefit of a college in that State. It was held that the stipulations of the bond were to be performed in Kentucky, and that, as it was valid by the laws of that State, the courts of New York would enforce it, notwithstanding it would be illegal in that State.

Boyle v. Zacharie, 6 Pet. 635, is a direct authority upon the point. There Zacharie and Turner were resident merchants at New Orleans, and Boyle at Baltimore. The latter sent his ship to New Orleans, consigned to Zacharie and Turner, where she arrived, and, having landed her cargo, the latter procured a freight for her to Liverpool. When she was ready to sail she was attached by process of law at the suit of certain creditors of Boyle, and Zacharie and Turner procured her release by becoming security for Boyle on the attachment. Upon information of the facts, Boyle promised to indemnify them for any loss they might sustain on that account. Judgment was rendered against them on the attachment bond, which they were compelled to pay, and to recover the amount so paid they brought suit in the Circuit Court for Maryland against Boyle upon his promise of indemnity. A judgment was rendered by confession in that cause, and a bill in equity was subsequently filed to enjoin further proceedings on it, in the course of which various questions arose, among them, whether the promise of indemnity was a Maryland or a Louisiana contract. Mr. Justice Story, delivering the opinion of the court, said: "Such a contract would be understood by all parties to be a contract made in the place where the advance was to be made, and the payment, unless otherwise stipulated, would also be understood to be made there;" "that the contract would clearly refer for its execution to Louisiana."

The very point was also decided by this court in *Bell v. Bruen*, 1 How. 169. That was an action upon a guaranty written by the defendant in New York, addressed to the plaintiffs in London, who, at the latter place, had made advances of a credit to Thorn. The operative language of the guaranty was, "that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty." The court said: "It was an engagement to be executed in England, and must be construed and have effect according to the laws of that country," citing *Bank of the United States v.*

Daniel, 12 Pet. 54. As the money was advanced in England, the guaranty required that it should be replaced there, and that is the precise nature of the obligation in the present case. Pritchard could only be indemnified against loss and damage on account of his liability on the appeal bond, by having funds placed in his hands in Louisiana wherewith to discharge it, or by being repaid there the amount of his advance. To the same effect is *Woodhull v. Wagner*, Baldw. 296.

We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfilment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York. For error in its rulings on this point, consequently, the judgment of the Circuit Court is reversed, with directions to grant a new trial. *New trial ordered.*¹

CARNEGIE v. MORRISON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported 2 Metcalf, 381.*]

SHAW, C. J.² Action of assumpsit, brought by Carnegie & Co., a mercantile firm at Gottenburg, Sweden, against Messrs. Morrison, Cryder, & Co., of London. The action is founded upon a letter of credit given by the defendants, by Mr. Oliver, their general agent, residing in Boston, upon the application of Mr. John Bradford, in favor of the plaintiffs, and for the purpose of paying, in part, a large debt due from Bradford to the plaintiffs for merchandise before shipped to him on credit. The letter of credit is of the following tenor:

"BOSTON, 4 March, 1837.

"MESSRS. MORRISON, CRYDER, & Co., London:—Mr. John Bradford of this city having requested that a credit may be opened with you for his account in favor of Messrs. D. Carnegie & Co. of Gothenburg for three thousand pounds sterling, I have assured him that the same will be accorded by you on the usual terms and conditions.

"Respectfully your obt. serv't,

"FRANCIS J. OLIVER.

"For £3,000."

It appears by the evidence that Oliver was the general agent of the defendants in Boston; that this letter of credit was obtained upon the

¹ *Acc. Seiders v. Merchant's Life Assoc.*, 93 Tex. 194, 54 S. W. 753. Conversely it has been held that a contract valid at the place of making but void by the law of the place of performance is invalid. *Hawley v. Bibb*, 69 Ala. 52 (*semble*); *Thayer v. Elliott*, 16 N. H. 102.—ED.

² Part of the opinion only is given.—ED.

application of Bradford, and was immediately forwarded to the plaintiffs at Gottenburg; and that notice of it was given to the defendants at London. Mr. Oliver knew the purpose for which Bradford wanted it. He had often had similar letters of credit from Mr. Oliver before; all of which have been honored, except one other in favor of Scholfield & Co., which is now in controversy in this court. Mr. Bradford was accustomed to give satisfactory security, from time to time, to Mr. Oliver, and to pay the defendants a commission of one per cent. It also appears that upon the strength of this letter of credit, the plaintiffs drew a bill or bills on the defendants, according to the usual mode of drawing bills at Gottenburg on London, which the defendants declined accepting. Various other circumstances were given in evidence, but this is a summary of the leading facts in the case.

This action, if it can be maintained at all, as between these parties, must be maintained on the letter of credit. But a question meets us at the outset, what law shall determine the rights of the parties in this transaction? It is obvious that the undertaking of the defendants was to do some act out of this country. The substance of that undertaking was to give Bradford a credit for the use and benefit of Carnegie & Co.; in other words, the substance and effect of that undertaking was to pay a sum of money to Carnegie & Co. in discharge of Bradford's debt to them, by means of bills of exchange to be drawn by Carnegie & Co. on the defendants, in their own favor, or in favor of their appointee, for their use, in consideration of the promise of Bradford to provide funds to meet those bills, giving them satisfactory security, placed in the hands of their agent, and in further consideration of a commission of one per cent paid by Bradford.

In considering the nature of this transaction, the inquiry involves two questions: first, whether the transaction in question constitutes a contract, in which the plaintiffs have an interest; and, secondly, whether the interest of the plaintiffs in this contract is of such a character that they can maintain an action upon it in their own names. The question, therefore, does not depend exclusively upon the *lex fori*, although, as the action is brought in this Commonwealth, its laws must determine whatever relates to the remedy. Supposing that the *lex loci contractus* is also to have a bearing on the question, it must be considered that some of the rules applicable to the construction and effect of contracts are founded in positive law, established by usage or by statute, which each country will establish for itself, according to its own views of convenience and policy, and have a local operation; whilst others are derived from those great and unchangeable principles of duty and obligation which are everywhere recognized amongst mercantile communities, and indeed amongst all civilized nations, as lying at the foundation of civil contracts, and must be considered as having the same effect, wherever by the comity of nations contracts made in one country are allowed to be carried into effect by the laws of another. In some States, for instance, a bond made to one or his assigns is re-

garded as a negotiable instrument, and creates an obligation to pay to the obligee, or any person who shall legally become the assignee of it. In others, a note for money, payable to one or order, creates a legal obligation to the payee only, and an indorsee cannot maintain a suit in his own name. Whether an instrument, made in a particular form, shall have the one or the other construction, will depend upon the positive law of the country which governs it; and such law therefore will determine the nature and legal obligation of the contract created by it; it is positive law, concurring with, and giving effect to, the act of the parties, which determines the nature and extent of such contract. But that a party entering into a formal stipulation to pay money, or do some other beneficial act to or for another, shall substantially perform that undertaking, is a great principle of moral as well as legal obligation, and of international as well as municipal law, recognized everywhere.

Taking it as settled, in the present case, that the defendants became subject to a duty or obligation of some kind, the real subject of discussion is not merely as to the remedy, but whether the facts now in proof constituted a contract between these parties which may be enforced by an action.

The objection to such an action, and the ground of this defence, are that the immediate parties to the transaction were Bradford on the one side and the defendants on the other; that to this transaction the plaintiffs were strangers; and that as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others, who may subsequently assent to, and become interested in its execution; an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange, the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill, he, the drawer, will allow the amount in account, if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid. He also contracts with any person who may become indorsee, that he will pay him the amount if the drawee does not accept and pay the bill. The law creates the privity. So in the familiar case of money had and received, if A. deposits money with B. to the use of C., the latter may have an action against B., though they are in fact strangers. But if C., not choosing to look to B. as his debtor, calls upon A. to pay him, notwithstanding such deposit (as he may), and A. pays him, A. shall have an action against B. to recover back the money deposited if not repaid on notice and demand. The law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. *Hall v. Marston*, 17 Mass. 575. So in regard to a very common transaction; when one

deposits money in a bank to the credit of a third person, and forwards him a certificate, or other evidence of the fact, the bank is regarded as coming under an obligation to pay the money to the person to whose credit it is thus deposited. So it is held in England, when the depositor assents to receive the money, though there is no consideration moving from the plaintiff to the defendant. *Lilly v. Hays*, 5 Adolph. & Ellis, 548. We think, therefore, it is no decisive objection to an action by the plaintiffs, that the act done constituted, at the same time, a contract between the defendants and Bradford, on which the latter might provisionally have had a remedy, in case the plaintiffs should not assent to, and enforce the contract, so far as it was intended for their benefit.

From this view of the case, it is manifest that the question whether a particular transaction constitutes a contract, and between whom, upon which one party can have a remedy against another by judicial proceedings, must depend upon the law governing such contract, as well as the law of the forum where it is sought to be enforced. The remedy may be sought in the form of an action at law, or a bill in equity, or before any special tribunal, according to the law of the place where it is sought. But the question whether a particular act or instrument constitutes a contract, and between what parties, is previous in its nature, and must generally be settled before any question of remedy arises.

What then is the law of the contract, or, in other words, what law determines whether an act done constitutes a contract, and if so, between whom and to what effect? The general rule certainly is, that the *lex loci contractus* determines the nature and legal quality of the act done; whether it constitutes a contract; the nature and validity, obligation and legal effect of such contract; and furnishes the rule of construction and interpretation. There may, perhaps, be exceptions to this rule; as where parties happen to meet on a desolate island in a savage country, where the principles of commerce and civilization do not prevail, or where a settled municipal law is not enforced or regarded. Perhaps such would be the construction of a contract between American or European merchants in China, who rather reside on the confines of that empire than live under its government; and where they may be presumed to have reference, in their dealings, to the general laws and usages of the commercial world, without regard to the laws of the people with whom they temporarily reside. But a contract, made in one country, may contemplate the execution of deeds or other contracts, making payments, or doing other legal acts in another; in regard to which, the law of the foreign country, where the act is to be done, will govern the contract; and the obligation of such contract will bind the contracting party to do all such legal acts according to the law of the place where they are to operate, so as to have their full legal effect. As if a person in one country should contract to convey land in another; the general rule being that the *lex loci rei sitæ* sur

nishes the rule which regulates titles and conveyances of real estate, the true construction and legal effect of such contract would be that the conveyance should be executed in such form as effectually to transfer the title according to the law of the place where the land lies. If the land were in Massachusetts, where the law requires the execution and acknowledgment of a deed, it would bind the contracting party to execute and acknowledge such deed, though made in a country where, by its municipal law, a deed would not be necessary. If the stipulation be that the drawee shall accept a bill in a foreign country, and the law of that country require that a valid acceptance shall be in writing, though not required by the law of the place where drawn, it is a contract that the drawee shall accept the bill in writing.

That the transaction now in question constituted a good contract to some purpose, and between some parties; that it was made on a good, valuable, and adequate consideration, and made in Massachusetts, is not contested. Then the rule *prima facie* is, that the construction and legal effect of this transaction are to be determined by the law of Massachusetts. That is the law which must be regarded, in the first instance, in deciding whether the act done constituted a contract, and if so, between whom, and to what effect, and must prevail unless the case falls within some exception to the general rule; and the question is whether it does. It is true that the parties to this suit are both foreigners, one residing in Sweden and the other in England. This, however, is immaterial, and only respects the question who may sue and be sued in our courts. By the comity of nations, alien friends are allowed the benefit of our courts in seeking their civil rights as plaintiffs; and the defendants, by placing their property under the control and protection of our government, place themselves within the jurisdiction of our courts. But the immediate actors in the transactions were here. Bradford, the prime mover, who opened and conducted the negotiation, paid the consideration, and caused the obligation to be entered into, was a resident citizen of Massachusetts; and though in legal strictness he might not be considered as the agent of the plaintiffs before they had assented to and adopted his act, yet still he so far acted for them as to procure a stipulation, which, if executed, would inure to their benefit. The other party, though domiciled abroad, were here for the purpose of conducting mercantile and financial business by their regularly constituted resident agent. The money was paid, or the security given, in Boston, which constituted the consideration for the defendants' undertaking. The negotiation, which terminated in giving the letter of credit, was commenced and completed in Boston.

That some things are referred to foreign laws and usages, in this agreement, is manifest in the instrument itself. The words, "on the usual terms and conditions," are obviously of this character. They refer to the laws and usages both of Sweden and England. All parties, of course, knew that the credit was to be given by the defendants by means of bills of exchange, although this is not expressed in terms.

Supposing that the object was that this credit should be afforded by means of bills of exchange, to be drawn by Carnegie & Co. in Gottenburg, on Morrison & Co. in London, the instrument refers to the laws and usages of Sweden for the mode of drawing, and to those of England for the mode of acceptance; and the legal effect and obligation of the contract in Boston are that the parties will respectively conform to those laws and usages in the performance of their respective acts. But it is not as to the non-observance of any of these that the question arises. The gravamen of the complaint is that the defendants have violated the obligation of their contract in its entire substance. It becomes, therefore, necessary to inquire and ascertain more exactly what that contract, in its legal effect and operation, was. The substance of the undertaking of the defendants may, we think, be simplified and expressed thus: Whereas, John Bradford is indebted to Messrs. Carnegie & Co. of Gottenburg, in the sum of £3,000, and has requested us to pay them that amount for him, by means of bills of exchange to be drawn on us at London; we hereby, for value received of him for that purpose, to our satisfaction, promise to accept their bills to that amount, payable to themselves or their order, and pay them accordingly.

The question is, supposing a general failure in the performance of this undertaking, who is entitled to a remedy for such breach, and by what law shall this question be determined? The assurance or promise is in terms made to Bradford; but the substantial benefit to be derived from the performance of it would be the plaintiffs', and therefore they are damnified by the breach. Bradford had procured the defendants to pay his debt for him to the plaintiffs for a satisfactory pecuniary consideration, and immediately gave notice thereof, and remitted the contract to the plaintiffs, who assented to and accepted it. It may be fairly presumed that, but for this transaction, Bradford would have adopted some other mode of remittance. Regarding it as a question of principle and not of technical law, it was an undertaking in which the plaintiffs had an interest nearly or quite as direct, and as great, as if the promise had been in terms to them, or the negotiation had been with them; or as if the instrument had been a promissory note, procured by Bradford to be made payable to them, in consideration of money paid and security given by him, and such note afterwards remitted to and received by them. Upon these facts, the court are of opinion that the construction, the obligation, the legal effect and operation of this transaction are to be governed by the law of Massachusetts. So far as this transaction constituted a legal and binding contract at all, it was, we think, by force of the law of the place of contract operating upon the act of the parties, and giving it force as such. The undertaking, it is true, was to do certain acts in England, to wit, to accept and pay the plaintiffs' bills; but the obligation to do those acts was created here, by force of the law of this State, giving force and effect to the undertaking of the defendants' agent, and mak-

ing it a contract binding on them. Supposing the law of England had provided that no letter of credit should be issued, unless under seal, or stamped, or attested by two witnesses, or acknowledged before a notary, is it not clear that, as no such formalities are required by our laws, a letter of credit made here would be held good without such formalities? We think it would be so held even in England, under the authority of the general rule, that a contract, valid and binding at the place where made, is binding everywhere. There is no reference, tacit or express, in this instrument, to the laws of England, which can raise a presumption that the parties looked to them as furnishing the rule of law which should govern this contract. It was, therefore, in our opinion, in legal effect, a contract made in Massachusetts by parties, both of whom were here by their agents, or persons acting for their benefit and in their behalf, and therefore the nature, obligation, and effect of this contract must be governed by the law of this Commonwealth.

ARBUCKLE v. REAUME.

SUPREME COURT OF MICHIGAN. 1893.

[*Reported 96 Michigan, 243.*]

LONG, J.¹ This action was brought to recover upon two promissory notes, dated February 4, 1889, and executed and delivered to the plaintiffs' agent in this State, but payable at plaintiffs' office, at Toledo, Ohio. The defendant, Peter Donnelly, pleaded the general issue, and denied the execution of the notes. The other defendants did not appear, and were defaulted.

It was admitted that, while the notes bore date as of Monday, they were in fact executed and delivered to the agent of the payees in this State on Sunday. The court below ruled that, though the notes were executed and delivered in this State on Sunday, yet, the testimony showing that the office of the plaintiffs was in Ohio, and the contract to be performed there, that they were not void, under section 2015, How. Stat., as the laws of Ohio, and not of Michigan, governed the transaction; and judgment was given in favor of the plaintiffs. . . .

The court below was in error in holding that the notes could be

¹ Part of the opinion is omitted. — Ed.

enforced here by reason of being made payable in Ohio. Parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the State.

It is an elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. 7 Wait, Act. & Def. p. 114; *Myers v. Meinrath*, 8 Amer. Rep. 371.

The judgment must be reversed, and a new trial ordered.

The other justices concurred.¹

BAXTER NATIONAL BANK v. TALBOT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 154 *Massachusetts*, 213.]

MORTON, J. The plaintiff seeks to recover in this suit from the defendant as indorser on five promissory notes, and to reach and apply in payment of them the interest of the defendant in a partnership of which he is a member. The notes were made by the Esperanza Marble Company, to its own order, were indorsed in blank by it and the defendant, and by two other parties, and were all made payable at the "Baxter National Bank, Rutland, Vt.," which we assume to be the plaintiff bank. This suit is against the defendant alone. The defendant in his answer alleged that his indorsement was made and took effect as a contract in the State of Vermont, and that by the law of that State his obligation depended, as between the plaintiff and himself, or any other party taking the notes with notice, upon the understanding or agreement between the bank and himself at the time when each indorsement was made in regard to said indorsement. The defendant further alleged that his indorsement was in fact made subject to an oral agreement with the plaintiff, which the defendant has fully performed, that "he was not to be liable thereon except to the amount of any moneys which he might receive upon a certain mortgage upon property in the State of New York." At the trial, the defendant offered testimony tending to prove these allegations. The court received it *de bene*, and at the conclusion of all the testimony ruled that the *lex fori* and not the *lex loci contractus*, must govern the case; that the oral agreement and the evidence tending to prove it were inadmissible and immaterial, and could not be considered by the jury. The defendant excepted to this ruling, and the question before us is as to its correctness.

¹ *Acc. Swann v. Swann*, 21 Fed. 299; *McKee v. Jones*, 67 Miss. 405, 7 So. 348.—ED.

The testimony introduced by the defendant tended to show the following, among other facts, in regard to his indorsement of the notes in suit. In January, 1887, the plaintiff bank held overdue notes which it had discounted for the Esperanza Marble Company of New York, but which had its usual place of business in Rutland. Part of these notes were indorsed by the defendant. The plaintiff also held a mortgage on certain property in New York as collateral to these notes, but found it inconvenient to attend to its collection, and requested the defendant to attend to it in its behalf; and it was orally agreed between the defendant and the plaintiff that the mortgage should be assigned to the defendant, and that he should collect the same and pay over the proceeds to the bank. It was also orally agreed that the notes held by the bank against the Marble Company should be surrendered to it and new notes given by it therefor, which should be indorsed by the defendant and the other two parties whose names are on the notes in suit, and that the notes should be renewed from time to time as they fell due, the renewals being indorsed by the same parties, until the total amount collectible on the mortgage had been received and paid over by the defendant to the plaintiff bank. It was further orally agreed that the defendant should not be liable on his indorsements beyond the amount which he might receive on account of the mortgage and fail to pay over to the plaintiff, and that he should be held liable on his indorsements only to secure the performance of his agreement to collect and pay over on account of the mortgage. The agreement thus made was carried out. The overdue notes of the Marble Company were surrendered to it, and new notes, indorsed by the defendant and the other parties, were taken in their stead. These have been renewed from time to time, the renewals being indorsed by the same parties, and the notes in suit are renewals of said original notes. The notes have all been made payable at the plaintiff bank in Rutland, and the defendant's indorsement upon all of them was made and took effect as a contract made in Vermont. The mortgage was assigned to the defendant, and he has paid over to the plaintiff bank all the money which he has collected under it.

The jury found by direction of the court that the notes in suit were made payable in the State of Vermont, and that the defendant's indorsement was made and took effect as a contract in that State.

It is apparent that, if the *lex fori* is to govern, the defendant cannot avail himself of the oral agreement entered into between the plaintiff and himself. *Adams v. Wilson*, 12 Met. 138; *Wright v. Morse*, 9 Gray, 337. We do not think, however, that it should govern. It is clear that in all that relates to a contract, to its nature and validity and interpretation, the law of the place where it is made governs. *Carnegie v. Morrison*, 2 Met. 381; *Milliken v. Pratt*, 125 Mass. 374; *Shoe & Leather National Bank v. Wood*, 142 Mass. 563; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; *Nichols v. Mase*, 94 N. Y. 160; *Buzzell v. Cummings*, 61 Vt. 213; *Forepaugh v. Delaware, Lackawanna, &*

Western Railroad, 128 Penn. St. 217; Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 453. The law of the place where the contract is made is, without any express assent or agreement of the parties, incorporated into and forms a part of the contract. Contracts are presumed to be made with reference to the law of the place where they are entered into, unless it appears that they were entered into with reference to the law of some other State or country. Central Bank of Washington v. Hume, 128 U. S. 195, 207; Chapin v. Dobson, 78 N. Y. 74.

A contract valid in the State or country where it is made will be enforced even in a State or country where it would be invalid, provided it be not there contrary to public policy or morals. Parsons v. Trask, 7 Gray, 473; Milliken v. Pratt, 125 Mass. 374; Fonseca v. Cunard Steamship Co., 153 Mass. 553; Forepaugh v. Delaware, Lackawanna, & Western Railroad, 128 Penn. St. 217.

On the other hand, it is equally clear that, in all that relates to the procedure for enforcing a contract, the law of the forum controls. Carnegie v. Morrison, 2 Met. 381; Hoadley v. Northern Transportation Co., 115 Mass. 304; Shoe & Leather National Bank v. Wood, 142 Mass. 563. Thus the form in which and the parties by or against whom the action shall be brought, the competency of the evidence offered to establish the alleged cause of action, whether the cause or action is barred by the statutes of limitation, whether a party can maintain an action in his own name or is obliged to use that of another, whether a contract is negotiable, and whether it is to be sued on as a specialty or as a simple contract, with many other similar things, have been held to be matters affecting the remedy, and therefore to be governed by the law of the forum. Pearsall v. Dwight, 2 Mass. 84; Orr v. Amory, 11 Mass. 25; McClees v. Burt, 5 Met. 198; Foss v. Nutting, 14 Gray, 484; Richardson v. New York Central Railroad, 98 Mass. 85; Hoadley v. Northern Transportation Co., 115 Mass. 304; Leach v. Greene, 116 Mass. 534; Drake v. Rice, 130 Mass. 410; Downer v. Chesebrough, 36 Conn. 39; Leroux v. Brown, 12 C. B. 801; Stoneman v. Erie Railway, 52 N. Y. 429.

It is sometimes difficult to decide whether the question raised in a given case relates to the nature and validity of the contract or to the remedy upon it. We think in the present instance it relates to the former, and not to the latter. The defendant contended that under the laws of Vermont his obligation growing out of his indorsements was not an absolute one, but depended, as between the parties, upon the oral agreement or understanding between them, if any, at the time when he placed his name upon the notes. The defendant further contended that, when he placed his name upon the notes, he did so under an oral agreement with the plaintiff bank, by the terms of which his indorsement was only to be regarded as security for the payment by him to the bank of the money that he might collect on the mortgage which was assigned to him.

Assuming, as we must for the purposes of this case, that the law of Vermont was as stated by the defendant, the testimony offered by him bore clearly upon the nature and validity of the contract between himself and the bank. The defendant could not show what the agreement was in any other way than that in which he offered to show it. It was not an attempt on his part to vary a written contract, because, under the law of Vermont, the indorsement did not of itself constitute an absolute contract; but, in order to determine what the contract was, it was necessary to ascertain what agreements or undertakings were entered into at the time, and in connection with and as part of the indorsement. If there were none, then the contract between the plaintiff and the defendant was the usual contract growing out of a blank indorsement. If there were such undertakings or agreements, then they entered into and formed a part of the contract of indorsement. The evidence was rejected, not because it would have been incompetent to prove the facts which it was offered to establish, had the contract been valid in this State, but on the ground that it related to a matter affecting the remedy. Back of the question of remedy, however, lies the question of the contract itself, and we think the evidence should have been allowed as bearing upon that. See *Powers v. Lynch*, 3 Mass. 77; *Williams v. Wade*, 1 Met. 82; *Shoe & Leather National Bank v. Wood*, 142 Mass. 563; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Jemino*, 2 Strange, 733; *Wattson v. Campbell*, 38 N. Y. 153; *Dunn v. Welsh*, 62 Ga. 241; *Forepaugh v. Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217.

The plaintiff objects that there was no issue framed upon the laws of Vermont. But the ruling of the court rendered such an issue immaterial; besides, an issue could at any time have been framed, in the discretion of the court, if satisfied that justice required that it should be done, or the court could hear and pass upon the question itself. *Atlanta Mills v. Mason*, 120 Mass. 244.

Exceptions sustained.

ANDREWS v. POND.

SUPREME COURT OF THE UNITED STATES. 1839.

[Reported 13 Peters, 65.]

TANEY, C. J.¹ This case comes before the court upon a writ of error, directed to the judges of the Circuit Court for the Ninth Circuit and Southern District of Alabama.

The action was brought by the plaintiff as indorsee, against the defendants as indorsers of a bill of exchange in the following words:—

“NEW YORK, March 11, 1837.

“Exchange for \$7287⁷⁸/₁₀₀.

“Sixty days after date of this first of exchange, second of same tenour and date unpaid, pay to Messrs. Pond, Converse, and Wadsworth, or order, seven thousand two hundred and eighty-seven ⁷⁸/₁₀₀ dollars, negotiable and payable at the Bank of Mobile, value received, which place to the account of

“Your obedient servant

“To Messrs. Sayre, Converse & Co., }
Mobile, Alabama.” }

“D. CARPENTER.”

The case, as presented by the record, appears to be this. The defendants were merchants, residing in Mobile, in the State of Alabama. H. M. Andrews & Co. were merchants residing in New York; and before the above-mentioned bill was drawn, the defendants had become liable to H. M. Andrews & Co. as indorsers upon a former bill for \$6,000, drawn by E. Hendricks on Daniel Carpenter, of Montgomery, Alabama. The last-mentioned bill was dated at New York, and fell due on the 21st of February, 1837, and was protested for non-payment.

The defendant Pond, it seems, was in New York in the month of March, 1837, shortly after this protest; when H. M. Andrews & Co. threatened to sue him on the protested bill: and the defendant Pond, rather than be sued in New York, agreed to pay H. M. Andrews & Co. ten per cent damages on the protested bill, and ten per cent interest and exchange on a new bill to be given, besides the expenses on the protested bill.

According to this agreement, an account, which is given in the record, was stated between them on the 11th of March, 1837, in which the defendants were charged with the protested bill and ten per cent damages on the protest, and interest and expenses, which amounted altogether to the sum of \$6,625.25, and ten per cent upon this sum was then added, as the difference of exchange between Mobile and New York, which made the sum of \$7,287.78; for which the defendant Pond delivered to H. M. Andrews & Co. the bill of exchange upon which

¹ Part of the opinion only is given. — Ed.

this suit is brought, indorsed by the defendants in blank. The bill was remitted by H. M. Andrews & Co. to S. Andrews, at Mobile, for collection. The drawees refused to accept it, and it was protested for non-acceptance; and after this refusal and protest it was transferred by S. Andrews to J. J. Andrews, the present plaintiff. It is stated in the exception, that after this transfer it was a cash credit in the account between H. M. Andrews & Co. and S. Andrews. The bill was not paid at maturity, and this suit is brought to recover the amount.

There is no question between the parties as to the principal or damages of ten per cent charged for the protested bill of \$6,000; nor as to the interest and expenses charged in the account herein before mentioned. The defendants admit that the principal amount of the protested bill, the damages on the protest which are given by the act of Assembly of New York, and the interest and expenses, were properly charged in the account. The sum of \$6,625.25 was therefore due from them to H. M. Andrews & Co. on the day of the settlement, payable in New York. The dispute arises on the item of \$662.53, charged in the account as the difference of exchange between New York and Mobile, and which swelled the amount for which the bill was given to \$7,287.78. The defendants allege that the ten per cent charged as exchange was far above the market price of exchange at the time the bill was given, and that it was intended as a cover for usurious interest exacted by the said H. M. Andrews & Co. as the price of their forbearance for the sixty days given to the defendants. This was their defence in the Circuit Court, where a verdict was found for the defendants under the directions given by the court.

Many points appear to have been raised at this trial, which are stated as follows, in the exception taken by the plaintiff.

The defendant offered evidence, —

1. To prove that the said bill of exchange was usurious, according to the statute and laws of the State of New York. The plaintiff objected to the reading of the statute and depositions aforesaid, because the contract was not made with a view of the statute or laws of New York. But the bill of exchange was usury or not by the laws and statutes of Alabama; and that the contract was subject only to the laws of the State of Alabama, as to its obligatory force and validity; and he further objected, that if this contract were to be decided by the statute of New York, that this proof could not be given under this issue; but the court overruled all these objections, and permitted the depositions and statute to be read, to show the bill of exchange to be void by the laws of New York: to all which plaintiff excepts. . . .

Plaintiff moved the court to charge the jury that the contract expressed in this bill of exchange, if to be executed in Alabama, was subject alone to the laws of Alabama against usury; and that the usury laws of New York had no force, or anything to do with this investigation. This was refused by the court, and plaintiff excepts. . . .

Upon the whole case, and the several points stated, the court charged

the jury that . . . if they believed from the evidence that the drawers of the bill of exchange contracted with the drawee in the State of New York, at the time the bill was drawn, for a greater rate of interest than seven per centum per annum, for the forbearance of the payment of the sum of money specified in the bill, although it may have been taken in the name of exchange, the contract is usurious; and unless they believe from the evidence that the plaintiff took the bill in the regular course of business, and upon a fair and valuable consideration *bona fide* paid by him, and without notice of the usury, they ought to find for the defendants, otherwise for the plaintiff. . . .

Another question presented by the exception, and much discussed here, is, whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned this question is not very important. There is no stipulation for interest apparent upon the paper. The ten per cent in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise, the interest allowed in New York is seven per cent, and in Alabama eight; and this small difference of one per cent per annum upon a forbearance of sixty days could not materially affect the rate of exchange, and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations which make it necessary to decide this question. The laws of New York make void the instrument when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find that it was given upon a usurious consideration, the plaintiff would not be entitled to recover, unless he was a *bona fide* holder, without notice, and had given for it a valuable consideration; while by the laws of Alabama he would be entitled to recover the principal amount of the debt, without any interest.

The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews & Co. for the debt then due to them, payable at Mobile, in sixty days, with eight per cent interest, such a contract would undoubtedly have been valid, and would have been no violation of the laws of New York, although the lawful interest in that State is only seven per cent. And if in the account adjusted at the time this bill of exchange was given it had appeared that Alabama interest of eight per cent was taken for the forbearance of sixty days given by the contract, and the transaction was in other respects free from usury, such a reservation of interest would have been valid and obligatory upon the defendants, and would have been no violation of the laws of New York.

But that is not the question which we are now called on to decide.

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The defendants allege that the contract was not made with reference to the laws of either State, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due, and that it was concealed under the name of exchange, in order to evade the law. Now if this defence is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute? Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last-mentioned cases the agreements were permitted by the *lex loci contractus*, and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere; and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine.

In the case of *De Wolfe v. Johnson*, 10 Wheat. 383, this court held that the *lex loci contractus* must govern in a question of usury, although by the terms of the agreement the debt was to be secured by a mortgage on real property in another State. And the case of *Dewar v. Shaw*, 3 T. R. 425, shows with what strictness the English courts apply their own laws against usury to contracts made in England. In the case under consideration, the previous debt for which the bill was negotiated was due in New York; a part of it, that is to say, the damages on the protest of the first bill, were given by a law of that State, and the debt was then bearing the New York interest of seven per cent, as appears by the account before referred to. And, if in consideration of further indulgence in the time of payment, the parties stipulated for a higher interest, and agreed to conceal it under the name of exchange, the validity of the instrument, which was executed to carry this agreement into effect, must be determined by the laws of New York, and not by the laws of Alabama.

In this aspect of the case another question arose in the trial in the Circuit Court. By the laws of New York, as they then stood, usury was no defence against the holder of a note or bill who had received it in good faith, and to whom it was transferred for a valuable consideration and without notice of the usury. The present plaintiff claims the benefit of this provision; but upon the evidence in the case it is very clear that he does not bring himself within it. The bill of exchange was protested for non-acceptance while it was in the hands of S. Andrews, the agent of H. M. Andrews & Co., to whom it had been sent for collection; and this fact appeared on the face of the bill at the time it was transferred to the plaintiff. Now, a person who takes a bill, which

upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. There can be no distinction in principle between a bill transferred after it is dishonored for non-acceptance, and one transferred after it is dishonored for non-payment; and this is the rule in the English courts, as appears by the case of *Crossley v. Ham*, 13 East, 498. Now it is evident that no consideration passed between Carpenter, the drawer of the bill, and the defendants, who are the payers and indorsers. The bill was made and indorsed by the defendants for the purpose of being delivered to H. M. Andrews & Co., in execution of the agreement for further indulgence. And if that agreement was usurious, then the bill in question was tainted in its inception, and that taint must continue upon it in the hands of the present plaintiff.¹

BROWN v. NEVITT.

HIGH COURT OF ERRORS AND APPEALS, MISSISSIPPI. 1854.

[Reported 27 Mississippi, 801.]

HANDY, J.² This was a bill filed in the Southern District Chancery Court by James Brown, appellant, against John B. Nevitt, to foreclose a mortgage of real and personal property, executed by Nevitt to

¹ By the prevailing doctrine, where a contract is made in one jurisdiction to pay money in another, and the contract is usurious by the law of one jurisdiction and good by that of the other, the parties are said to be permitted to choose the one or the other law to govern their obligation, provided they do so *bona fide*; and they are presumed to have chosen that law which sustains the contract. *Junction R. R. v. Ashland Bank*, 12 Wall. 226; *Andruss v. People's B. & L. Assoc.*, 94 Fed. 575; *Dygart v. Vermont L. & T. Co.*, 94 Fed. 913; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 173 (cf. *Smith v. Muncie Nat. Bank*, 29 Ind. 158); *Brown v. Freeland*, 34 Miss. 181; *Coad v. Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757; *Townsend v. Riley*, 46 N. H. 300; *U. S. S. & L. Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Thornton v. Dean*, 19 S. C. 583; *Sharp v. Davis*, 7 Baxt. 607; *Fisher v. Otis*, 3 Chand. 83. If, however, the place of performance is not *bona fide* agreed upon, but is named as a means of evading the usury laws of the place of contracting, the contract is usurious. *Nat. Mut. B. & L. Assoc. v. Burch* (Mich.), 82 N. W. 837; *Meroney v. Atlanta N. B. & L. Assoc.*, 112 N. C. 842, 17 S. E. 637. See *McAllister v. Smith*, 17 Ill. 328.

In some jurisdictions, however, greater stress is laid on the law of the place of performance; and a contract good by the law of the place of contracting but void by that of the place of performance is held invalid, unless the parties are shown to have intended otherwise. *Jackson v. Amer. Mtg. Co.*, 88 Ga. 756, 15 S. E. 812; *Odom v. N. E. Mtg. Sec. Co.*, 91 Ga. 505, 18 S. E. 131; *Underwood v. Amer. Mtg. Co.*, 97 Ga. 238, 24 S. E. 847; *Dickinson v. Edwards*, 77 N. Y. 578. (See *Sheldon v. Haxton*, 91 N. Y. 124). — ED.

² Part of the opinion only is given. — ED.

Brown, to secure a debt amounting to \$32,500, and interest, consisting of several notes made by Nevitt to Brown, one for the sum of \$4,833.33½, two for the sum of \$10,833.33½ each, all bearing interest at the rate of eight per centum per annum from their date, also two drafts drawn by Nevitt on Samuel Nicholson, agent for Brown, amounting to the sum of \$6,000, all bearing the same date of the mortgage, and being payable at future days. The bill states that the first note and the two drafts had been paid, and claims that there was due on the two notes for \$10,833.33½, a balance of principal and interest of about \$23,879.60, and seeks a foreclosure.

The answer of Nevitt denies his indebtedness to the amount claimed in the bill, and alleges that the contract sought to be enforced against him is usurious, unlawful, and against the form of the statute in such case made and provided, and was made under the following circumstances: That Nevitt agreed with Nicholson, agent of Brown, that Brown should lend and advance to him the sum of \$32,500, on a credit of one, two, and three years, in equal annual instalments, to be secured by mortgage and to bear interest at the rate of eight per cent per annum from the date of the transaction; that \$10,000 of this amount was to be advanced by Brown, by causing a credit for that sum to be entered for Nevitt on the books of the Planters' Bank at Natchez, and the sum of \$16,500 of the money advanced was to be by a credit to that amount to be entered for Nevitt on the books of the Commercial Bank of Rodney; and the residue of said amount, \$6,000, was to be advanced in cash to Nevitt on the 1st of January thereafter; that the credits were accordingly given on the books of the banks, and the sum of \$6,000 was paid in cash, but that although the credits received on the books of the banks were at their nominal amounts, they were, at the time they were received, at a depreciation of twenty or twenty-five per cent below lawful money; that the notes and mortgage were executed for the credits so given, in part as for a loan and advance of so much money by Brown to Nevitt, and with the intention to require a greater rate of interest than was allowed by our laws. . . . It is insisted in behalf of the appellant, that as these notes were made payable in Louisiana, they are to be governed by the law of that State; and as it is not shown that the contract was usurious by the law of that State, that it cannot be held to be usurious under our laws. This argument would have much force if the objection to this transaction was merely that a rate of interest not permitted by our laws, but allowable by the laws of Louisiana, was claimed or charged *bona fide*, and not with the view of evading our laws upon the subject; for in such a case, the law of the place of performance of the contract would govern it. But a much more serious objection is raised to this contract. The usury is alleged to consist, not in the stipulation for a rate of interest upon a legal loan not allowed by our laws, though legal in the State of Louisiana, but in loaning or selling depreciated bank securities as if they were worth their nominal value, by means of which an illegal rate of interest and a usurious

profit upon the real value loaned or sold would be realized. The objection is, that the consideration of the contract is illegal, because the appellant thereby reserved, as a component part of the principal sum intended to be secured, a usurious rate of interest upon the sum advanced, this being inherent in the transaction, and necessarily governed by the laws of this State, where it was actually done. Such a transaction is held to be prohibited by our laws, as is above shown; and it cannot stand on the same principles with a *bona fide* agreement made in one place, to be executed in another. We cannot recognize the laws of Louisiana as rendering valid a contract made here and sought to be enforced here, which is prohibited by our laws. The rule in such cases is, that the agreement must stand or fall by the law of the place where it was made. *Andrews v. Pond et al.*, 13 Pet. 65; *Story, Confl. Laws*, 203.

Here the defendant alleges that a usurious interest and profit were intended to be secured to the appellant, by means of the advance of bank credits to the amount of \$26,500, as at par, when they were at a depreciation of from twenty to thirty per cent, retaining upon the nominal amount interest at the rate of eight per cent per annum from the date. And these allegations are sustained by the evidence. It is shown that the appellant's agent, who conducted the negotiation, was well aware of the depreciation of the bank funds, and of Nevitt's great desire to procure them; that he would not transfer the sterling bonds, which were somewhat more valuable than the general bank credits, and were the kind of funds which he knew that Nevitt especially desired to purchase, and that he insisted that the bank credits should be received by Nevitt at par; that all the efforts of Nevitt to obtain the funds and advances on better terms were unavailing; that he had to come to Nicholson's terms, take a smaller advance of acceptances than he desired, take the bank debt at par, and pay interest at the rate of eight per cent upon the whole amount. These circumstances show that by the giving time of payment on the notes of Nevitt, an interest and profit were intended to be secured, contrary to the law of this State, and which cannot be carried into execution by our courts.

AKERS v. DEMOND.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[Reported 103 *Massachusetts*, 318.]

WELLS, J.¹ The defence to this suit is, that the bills of exchange are void for usury, under the laws of New York, where they were first negotiated. The statute of New York, Rev. Sts. part 2, c. 4, tit. 3, § 5,

¹ Part of the opinion only is given. — Ed.

declares such securities void "whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken," a greater rate of interest than seven per cent. The Superior Court ruled that, upon the testimony offered, no defence was established, and instructed the jury to return a verdict for the plaintiffs. . . .

The testimony . . . tends to prove that the bills in suit were drawn by Reed and indorsed by William H. Russell, the payee, in New York, and accepted by the defendant in Boston, being upon their face addressed to him there. Both the acceptance and the indorsement were for the accommodation of Reed. The possession of collateral security, whether subsequent or at the time, does not change the character of the acceptance or the relations of the parties. *Dowe v. Schutt*, 2 Denio, 621. After the return of the acceptances to Reed, by an arrangement between him and the nominal payee, the latter procured the bills to be discounted by the plaintiffs, at the rate of one and a half per cent a month. The proceeds of one of the bills were retained by William H. Russell, the payee, as a loan from Reed, and the proceeds of the other handed over by him to Reed.

As the case is now presented, in the absence of controlling testimony on the part of the plaintiffs, the foregoing statement must be taken as the result of the evidence. It shows that the transaction by which the plaintiffs became holders of the bills was the original negotiation of the paper; a loan upon discount, and not a mere sale of the bills. They are therefore open to the defence of usury. This is so clearly shown to be the law of New York, by the decisions of the courts of that State referred to in *Ayer v. Tilden*, 15 Gray, 178, as to require no further citations.

The defendant is entitled to set up the usury, although not paid by himself, and although the loan was not made to him nor on his account. *Van Schaack v. Stafford*, 12 Pick. 565; *Duncomb v. Bunker*, 2 Met. 8; *Cook v. Litchfield*, 5 Seld. 279; *Clark v. Sisson*, 22 N. Y. 312.

The difficult question in the case arises from the fact that the paper was made payable in Boston. It is contended that the contract of the acceptor is to be governed by the laws of the place where the bills are made payable. The general principle is, that the law of the place of performance is the law of the contract. This rule applies to the operation and effect of the contract, and to the rights and obligations of the parties under it. But the question of its validity, as affected by the legality of the consideration, or of the transaction upon which it is founded, and in which it took its inception as a contract, must be determined by the law of the State where that transaction was had. No other law can apply to it. Usury, in a loan effected elsewhere, is no offence against the laws of Massachusetts. In a suit upon a contract founded on such a loan, the penalty for usury could not be set up in defence, under the statutes formerly in force in this Commonwealth. Neither can a penalty, as a partial defence, authorized by the laws of one State, be applied or made effective in the courts of another State.

Gale v. Eastman, 7 Met. 14. Such penal laws can be administered only in the State where they exist. But when a usurious or other illegal consideration is declared by the laws of any State to be incapable of sustaining any valid contract, and all contracts arising therefrom are declared void, such contracts are not only void in that State, but void in every State and everywhere. They never acquire a legal existence. Contracts founded on usurious transactions in the State of New York are of this character. *Van Schaack v. Stafford*, 12 Pick. 565; *Dunscomb v. Bunker*, 2 Met. 8. The fact that the bills now in suit were accepted in Boston and were payable there does not exempt them from this operation of the laws of New York. They were mere "nude pacts," with no legal validity or force as contracts, until a consideration was paid. The only consideration ever paid was the usurious loan made by these plaintiffs in New York. That then was the legal inception of the alleged contracts. *Little v. Rogers*, 1 Met. 108; *Cook v. Litchfield*, 5 Seld. 279; *Clark v. Sisson*, 22 N. Y. 312; *Aeby v. Rapelye*, 1 Hill, 1. By the statutes of New York, that transaction was incapable of furnishing a legal consideration; and, so far as the bills depend upon that, they are absolutely void. The original validity of such a contract must be determined by the law of the State in which it is first negotiated or delivered as a contract. *Hanrick v. Andrews*, 9 Port. 9; *Andrews v. Pond*, 13 Pet. 65; *Miller v. Tiffany*, 1 Wall. 298; *Lee v. Selleck*, 33 N. Y. 615.

There is no pretence that a discount of one and a half per cent a month was justifiable by reason of any added exchange between New York and Boston; nor that it was otherwise than usurious, if any amount of charge upon paper payable elsewhere than in New York would be usurious there. It has often been held, in States where restrictions upon the rate of interest are maintained, that it is not usury to charge upon negotiable paper whatever is the lawful rate of interest at the place where the paper is payable, although greater than the rate allowable where the negotiation takes place. But if the paper is so made for the purpose of enabling the larger rate to be taken, or the greater rate is received with intent to evade the statutes relating to usury, and not in good faith as the legitimate proceeds of the contract, it is held to be usury. So also, if a greater rate is taken than is allowed by the law of either State, it is usury. Such a rate necessarily implies an intent to disregard the statutes restricting interest. *Andrews v. Pond*, 13 Pet. 65; *Miller v. Tiffany*, 1 Wall. 298. The legal rate of interest or discount in Massachusetts is six per cent per annum; and, at the date of the negotiation of these bills, a greater rate than six per cent was usurious and unlawful.

It follows, from these considerations, that, upon the evidence as it now stands upon the part of the defendant, the transaction, upon which alone the bills in suit must depend for a consideration to give them validity as contracts, was illegal, and such as, under the laws of New York, renders them utterly void. No action, therefore, can be main-

tained upon them in the courts of Massachusetts, unless the effect of this evidence be in some way overcome or controlled. The verdict for the plaintiff must be set aside, and a *New trial granted.*¹

SCOTT v. PERLEE.

SUPREME COURT OF OHIO. 1883.

[Reported 39 Ohio State, 63.]

DORLE, J. The findings and judgment of the court, where a case is tried without the intervention of a jury, will not be disturbed by this court, unless such findings and judgment are clearly against the weight of the evidence. In the present case, the testimony, beyond what appears upon the face of the note, consists solely of that given by the two parties, Scott and Perlee. Which of them was to be believed, was a matter properly to be determined by the court trying the case, and if the judgment can fairly be sustained upon the testimony of either, it ought not to be reversed. *Landis v. Kelly*, 27 Ohio St. 571.

The court might well find from this testimony, if the plaintiff was believed, that in the summer of 1870, the plaintiff was in Fairbury, Illinois, where the defendant, Andrew J. Scott, resided; that the latter, desiring money to carry on some building enterprises in which he was engaged, in Illinois, applied to the plaintiff, who was his brother-in-law and visiting him at the time, for a loan, agreeing to pay him therefor ten per cent interest; that the plaintiff agreed to make the loan upon the terms named, upon defendant's note, with Henderson W. Scott, who lived in Ohio, as surety, and that without any further arrangement Scott wrote the note at Fairbury, at which place he dated and signed it; that it was then sent to Ohio to the surety, who signed it and delivered it to the payee, receiving the money in this State and forwarding it to the principal, and that the parties intended in good faith, to contract with reference to the law of Illinois, as to the rate of interest to be paid for the use of the money.

The question presented for our consideration therefore is, whether such a contract, thus made, is usurious? That this contract was executed in Ohio may be conceded; although signed in Illinois by the principal debtor and there dated, it was delivered in Ohio and was not a completed contract until delivery. The fact that the loan was negotiated

¹ In several jurisdictions a note invalid for usury where made is void, without regard to the law of the place of payment. *Falls v. Savings Co.*, 97 Ala. 417; *Astor v. Price*, 7 Mart. n. s. 408; *Atwater v. Walker*, 16 N. J. Eq. 42; *Maynard v. Hall*, 92 Wis. 565, 66 N. W. 715.

In most jurisdictions a contract good where made will not be affected by the usury laws of the place of payment. *Sturdivant v. Bank*, 60 Fed. 730; *Amer. Freehold M. Co. v. Sewell*, 92 Ala. 163; *Pine v. Smith*, 11 Gray, 38; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713. — ED.

for in Illinois in accordance with the written terms of the note, is not insignificant, however, in determining the intention of the parties to contract with reference to Illinois law. *Findlay v. Hall*, 12 Ohio St. 612. It is then, the case of a citizen of Illinois executing his note in Ohio, in pursuance of an arrangement previously made in Illinois, for money borrowed to be used in the latter State, with an agreement to pay interest according to her laws, not intending or attempting thereby to evade our usury laws, but in good faith. Is such a contract tainted with usury?

Since the cases of *Findlay v. Hall*, 12 Ohio St. 610, and *Kilgore v. Dempsey*, 25 Ohio St. 413, it is undoubtedly the law of this State, and indeed it is now well established almost universally, that where a contract is entered into in one State, to be performed in another, between citizens of each, and the rate of interest is different in the two, the parties may, in good faith, stipulate for the rate of either, and thus expressly determine with reference to the law of which place that part of the contract shall be decided. Where such a contract, in express terms, provides for a rate of interest lawful in one but unlawful in the other State, the parties will be presumed to contract with reference to the laws of the State where the stipulated rate is lawful, and such presumption will prevail until overcome by proof that the stipulation was a shift to impart validity to a contract for a rate of interest, in fact usurious. *Fisher v. Otis*, 3 Chandler, 102; *Butters v. Old*, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 198; *Newman v. Kershaw*, 10 Wis. 340; *Horsford v. Nichols*, 1 Paige, Ch. 225; *Townsend v. Riley*, 46 N. H. 300; *Depau v. Humphreys*, 20 Mart. (La.) 1; *Fanning v. Consequa*, 17 Johns. 511; *Pratt v. Adams*, 7 Paige, 615; *Chapman v. Robertson*, 6 Paige, 627; *Richards v. Globe Bank*, 12 Wis. 696.

If the parties to the note in question had expressly stipulated in the note that it was payable in Illinois, the contract to pay ten per cent interest would be perfectly valid, although the note was executed in Ohio. Is it rendered invalid by reason of the omission to make that express stipulation? It is not entirely settled by the authorities where this note, as a matter of interpretation, is payable, there being no place expressly stipulated; but the weight of authority and the sounder reason, we think, sustain the proposition, that a note dated and signed at the place of residence of the debtor, and containing stipulations, lawful under the laws of such place, but forbidden by the law of the residence of the creditor, or where the note was completed by delivery and no other place of payment is named, will be presumed to be payable at the former place, assuming of course that no attempted evasion of the usury law of the latter is proved. In other words, in the absence of any proof the presumption of law is that the note in question is an Illinois contract, and is valid both as to principal and interest. To overcome this presumption the actual facts may be shown. It is shown that the contract was delivered in Ohio; but, taken in connection with the other facts proved, that does not overcome the presumption that it

is payable in Illinois, where the debtor resides, where he dated and signed his contract, and where alone it is legal according to all of its terms. 2 Parsons on Contracts, 584, and cases cited; Daniels' Neg. Inst. § 90; Arnold v. Potter, 22 Iowa, 198; Tillottson v. Tillottson, 34 Conn. 336; Jewell v. Wright, 30 N. Y. 264. Where such express stipulation would uphold the contract, if the same thing can fairly be inferred from what is stipulated, it will likewise be upheld.

But, while we believe that this contract can be thus sustained, it is not necessary to place the decision upon that ground. There is no reason why a citizen of Illinois, or any other State, may not come into Ohio and borrow money to be used in the State of his residence, and in good faith contract with reference to the laws of the latter State, independently of where his note is executed or where it is legally presumed to be payable. In such case the only question is one of good faith. Did he honestly contract with reference to the law of his allegiance, the law of the State or country where he lives?

In Arnold v. Potter, 22 Iowa, 194, the note was made by a citizen of Iowa, in Massachusetts, payable in New York, and the court instructed the jury that "If defendant went to Boston and urged the loan and promised ten per cent under the laws of Iowa, and all the arrangements and contracts were made as to the laws of Iowa, in good faith, then the defence fails and plaintiff can recover. If the parties in good faith loaned and borrowed the money sued for with a full understanding that the law of Iowa was to govern as to the interest, then the laws of New York and Massachusetts can have no influence, but the understanding of the parties must prevail." The Supreme Court in affirming this charge say: "The form of the transaction is nothing, the cardinal inquiry being when the contract specifying the amount reserved is express, did the parties resort to it as a means of disguising the usury in violation of the laws of the State where the contract was made or to be executed, and in arriving at this intention all of the facts are to be taken into consideration."

It is true that in this case, like Chapman v. Robertson, *supra*, security was given by mortgage upon lands in the State of the debtor's residence, but the fact that security is given for a note does not alter the terms of the note. But such fact has significance in determining what the intention of the parties was, as to the laws of which State their contract had reference, or by which it was to be construed. Newman v. Kershaw, 10 Wis. 341; Fisher v. Otis, 3 Chandler, 83; Horsford v. Nichols, 1 Paige, Ch. 225; 2 Kent, Com. 12 ed. 460, bottom p. 623. It is a fact of no greater significance than is found in this case, where the borrower actually negotiated for the loan in the State of his residence, dated his note there, and stipulated for interest allowed by her laws. See Horsford v. Nichols, *supra*; 10 Wis. 340.

In a recent case, Kellogg v. Miller, 13 Fed. Rep. 198, decided by McCrary, C. J., in the Circuit Court of Nebraska, he held, upon a state of facts very like those recited in this case, except that there was a

mortgage security, that the contract was valid upon both grounds assumed in this opinion, first, because the contract was to be performed in Nebraska, and second, the ground we are now considering, "A citizen of one State may loan money to a citizen of another State, and contract for the rate of interest allowed by the laws of the latter State, although the legal rate of interest allowed is greater in such State than in the State where the contract is made, and in which it is to be performed." See also *Tilden v. Blair*, 21 Wall. 241, and comments thereon of Folger, J., in 77 N. Y. 580, that the ruling consideration of that case was the intention of the parties, that the draft should be used in Illinois, as a contract of that State, although accepted and payable in New York. *Wayne Co. Savings Bk. v. Low*, 6 Abb. N. C. 76, 95, *aff'd* 81 N. Y. 569; 2 Kent, Com. 12 ed., bottom p. 622-625, and note; *Vliet v. Camp*, 13 Wis. 208. Indeed these cases are but applications of the rule as given by Lord Mansfield. "The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." *Robinson v. Bland*, 2 Burr. 1078. The place of making the contract is not to be so exclusively regarded, but that when the contracting parties had reference to another place that may be regarded; that is, the intention of the parties shall govern when it is made manifest. *Fisher v. Otis*, *supra*. That the parties here entered into this contract in good faith with reference to the laws of Illinois, there can be no doubt. The law of Ohio never entered into the transaction so far as the intention of the parties can be ascertained. There was no intention to make an illegal contract; and to hold it illegal, we must be able to say that the mere fact that Scott forwarded this note to his surety for his signature, and that it was signed and delivered by the surety in Ohio, and the money there paid (more than probably as a mere matter of convenience), has the effect of defeating the intention of the parties. It is difficult to perceive upon what principle we should so find.

We do not in thus holding encourage two citizens of Ohio to attempt to contract here for money to be used here, and make their notes payable in another State; nor in any way relax the strictness of the rules which prevent any form of evasion of the law against usury; but we hold that it is not repugnant to such law for a person to contract with reference to the law of his domicile, for money to be used there, where no such evasion is sought or intended.

*Judgment affirmed.*¹

¹ *Acc. Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024. *Contra*, *Amer. Freehold L. & M. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464 (*semble*); *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141. — Ed.

BIGELOW v. BURNHAM.

SUPREME COURT OF IOWA. 1891.

[Reported 83 Iowa, 120.]

BECK, C. J. The promissory note is in the following language:

"STORM LAKE, BUENA VISTA CO., IOWA.

"For value received I promise to pay Rufus Burnham or bearer eighteen hundred and fifty-eight dollars and sixty-three cents, within one year from date, with interest at seven per cent. May 2, 1885.

"ROLLIN BURNHAM."

The answer of the defendant admits the execution of the note in suit, but alleges that it was executed and delivered in the State of New York, and that under the laws of that State it is usurious and void. The statutes of New York declare that all notes and other contracts, providing for the payment of interest at a rate greater than six per centum per annum, shall be void. The evidence shows that the note in suit was signed in New York, and delivered there, and that the plaintiff at the time, and both prior and subsequently thereto, resided, and still does reside, in Storm Lake, in this State, and the payee of the note resided in New York. It is not shown where the indebtedness was incurred for which the note was given, nor where the consideration therefor was delivered to and received by the plaintiff, nor was there any evidence showing an agreement for the payment of the note at any specified place. The only facts upon which the case was decided are that the note was executed in New York, and that the payee resided in that State.

It is a settled rule that the law of the place where a contract or a note by its terms is to be performed determines the question of its validity. *Butters v. Olds*, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 194; *Burrows v. Styker*, 47 Iowa, 477; *Story on Conflict of Laws*, §§ 242, 280, 281; *Andrews v. Pond*, 13 Pet. 65; 2 *Parsons on Notes and Bills*, 320.

The date and place of execution of a promissory note, which appear on its face, and not by mere memorandum entered thereon, raise the presumption that it is payable at that place. The reason of this rule is based upon the fact that the mention of the place is always intended to show that the note was executed there, just as the entry of the date is intended to show the day of execution. In business affairs, and the general affairs of life, the date of an instrument, and the place named in connection with the date, are written thereon, in order to show the day and place of its execution. The law will raise a presumption in accord with this uniform custom of men generally. The place named in a promissory note as the place of execution is usually the place of

residence or business of the maker of the paper, and is embodied in the note to show where it may be presented for payment. It follows that the law raises a presumption upon the face of the note of an agreement that it is payable at the place indicated as the place of its execution, and permits it to be enforced under the law prevailing there. 1 Parsons on Notes and Bills (1 ed.), 441, 442; Bullard v. Thompson, 35 Tex. 313; Orcutt v. Hough, 54 N. H. 472; Ricketts v. Pendleton, 14 Md. 320.

It will not do to presume that the parties entered into a contract, which is void under the laws of New York, and that they intended that it should be subject thereto. Such presumption would charge them with the folly or the fraud of entering, with their eyes open, into a void contract. Men are not presumed by the law to act in folly or in dishonesty, but rather that they intended in good faith that their acts shall be valid, and what they purport to be. Nor will we by presumption bring the case under the usury law of New York, which is penal in its effects. Bullard v. Thompson, 35 Tex. 313; Thompson v. Powles, 2 Sim. 194.

When a contract is made in one State, to be performed in another, and in express terms provides for a rate of interest lawful in one, but unlawful in the other State, the parties will be presumed to contract with reference to the laws of the State wherein the stipulated rate of interest is lawful, and such presumption will prevail until overcome by proof that the stipulation was intended as a means to defeat the law against usury, and to support a contract otherwise usurious. If it be a *bona fide* transaction the contract will be sustained; if a device for securing usurious interest it will be held invalid. Scott v. Perlee, 39 Ohio St. 63; Newman v. Kershaw, 10 Wis. 333; Fisher v. Otis, 3 Chand. (Wis.) 83; Richards v. Bank, 12 Wis. 692; Horsford v. Nichols, 1 Paige, 220; Pratt v. Adams, 7 Paige, 615; Fanning v. Consequa, 17 Johns. 511; Townsend v. Riley, 46 N. H. 300; Arnold v. Potter, 22 Iowa, 194; Butters v. Olds, 11 Iowa, 1. See note to Martin v. Johnson, 8 Lawyer's Rep. Ann. 170; 10 S. E. Rep. 1092.

It appears that the rule as to the law of contracts, made in one State to be performed in another, is modified or softened when applied to contracts for interest, so that the intentions of the parties are effectuated, as a concession to trade and commerce. See Daniels on Negotiable Instruments, § 922, and cases cited; 2 Parsons on Contracts, § 5, p. 94, and cases cited. Hart v. Wills, 52 Iowa, 56, is not in conflict with our conclusions in this case, the note in that case being held to be an Iowa contract upon grounds not inconsistent with our decision in this case.

On the ground that the note upon its face will be presumed to be payable in Iowa, and in accord with other doctrines stated, we reach the conclusion that the judgment of the District Court ought to be

Reversed.

GALE v. EASTMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1843.

[Reported 7 Metcalf, 14.]

ASSUMPSIT by the payee against the maker of a promissory note made and payable in New Hampshire. The defence was usury.¹

SHAW, C. J. By the law of New Hampshire, the contract, even though usury were taken or received upon it, was not void; it was so far legal, that an action might be maintained and a judgment recovered upon it, with certain deductions. Act of 12th Feb., 1791. By § 2, it is provided that when usury is relied upon, in defence, a special mode of trial may be offered by the defendant; that is, a trial by oath of the parties, as formerly practised under the law of Massachusetts, St. 1783, c. 55, but which mode of proof and form of trial are now altered in this State. By the law of New Hampshire, still in force, if the usury is thus proved, a certain amount shall be deducted, in assessing the damages, from the principal and interest due on the note. These provisions apply only to the remedy, and of course can extend only to suits brought in New Hampshire, and can have no effect when a remedy is sought under our laws. The general rule is, that those provisions of law which determine the construction, operation, and effect of a contract are part of the contract, and follow it, and give effect to it, wherever it goes; but that in regard to remedies, the *lex fori*, the law of the place where the remedy is sought, must govern. We therefore cannot be governed by the law of New Hampshire, which professes only to regulate the remedy on a usurious contract.

The law of Massachusetts, though somewhat analogous, cannot apply, because, although the mode of enforcing the law against usury is by applying it to the remedy, yet the law to be enforced is the law of Massachusetts. The law of this Commonwealth declaring what shall be the rate of interest, and what contracts shall be deemed usurious, also directs, when suits are brought, what deductions shall be made; but it is suits brought on such contracts, that is, contracts made in violation of its own provisions.

*Judgment for the plaintiff.*²

¹ This short statement is substituted for that of the Reporter. Arguments of counsel are omitted. — ED.

² Acc. *Sherman v. Gassett*, 9 Ill. 521; *Lindsay v. Hill*, 66 Me. 212; *Collins Iron Co. v. Burkam*, 10 Mich. 283; *Watriss v. Pierce*, 32 N. H. 560. See *Meares v. Finlayson*, 55 S. C. 105, 32 S. E. 986. — ED.

SECTION IV. — INTERPRETATION.

KNIGHTS TEMPLARS, &C. ASSOCIATION v. GREENE.

CIRCUIT COURT OF THE UNITED STATES, S. D. OHIO. 1897.

[*Reported 79 Federal Reporter, 461.*]

PETITION in the nature of an interpleader filed by the plaintiff association against the widow, mother, and brothers and sisters of John G. Greene, filed in the Superior Court of Cincinnati, and removed to this court. The petition was filed to determine who among the defendants should be paid the amount of an insurance policy issued by the plaintiff association in 1879 on the life of John G. Greene for the sum of \$5,000. He died in 1894. The plaintiff association was an Ohio corporation; one of its agents went to New York, where Greene then was and always remained domiciled, and secured from him an application for the policy; the policy was mailed from Ohio, probably to the company's agent in New York, and was delivered to Greene. At the time of Greene's death the policy was payable "to the heirs of the said John G. Greene."¹

TAFT, Circuit Judge.² It is contended on behalf of the widow of John G. Greene, the insured, that the word "heirs" should be construed according to the laws of Ohio. If so, it is conceded that, as the insured left no children, she would take the entire fund, whether the word "heirs" is to be construed strictly as meaning those who at his death would inherit real estate from the insured, or is to be taken as meaning those to whom personal property of the insured would be distributed if he died intestate. The administrator of Mary Greene, the mother of the insured (she having died since the beginning of this suit), and the brothers and sisters of the insured, contend that the word "heirs" is to be construed under the law of New York, and that, whether it is to be interpreted technically as those inheriting real estate, or only as next of kin, in either case, by the New York law, the widow, Sarah L. Greene, takes nothing. It is contended by the association (which has paid \$1,000 to the widow) and by the widow that, even if the New York law is to control the meaning of "heirs," the court must construe the word in accordance with that law to mean those to whom the proceeds of the policy would have gone had it been part of his estate and he had died intestate, and in that case by the intestate statutes of New York the widow would receive a moiety of the proceeds of the policy.

The application was made and delivered to the agent of the company in New York, and the certificate or policy was delivered by an agent of the company in New York to the insured. All payments were made in New York by the insured to an agent of the company, both those accompanying the original application and all subsequent ones. These

¹ This short statement of facts is substituted for that of the Reporter. — Ed.

² Part of the opinion is omitted. — Ed.

circumstances, under the decision in *Assurance Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, might seem to justify the conclusion that the contract, having been made in New York, should be construed by the New York law, and thus that the word "heirs," within the intention of the parties, should be construed to be "heirs" as interpreted by the New York law, rather than as interpreted by that of Ohio. I do not propose, however, to rest the decision in this case on its likeness to the case of *Assurance Soc. v. Clements*. There are some additional circumstances in this case which may, perhaps, distinguish this case from that. The policy was to be approved and issued in Ohio. The policy was to be payable there. In cases where both parties are interested in the construction of the insurance contracts, these circumstances are sometimes regarded as important.

But I do not think this a case for construing the terms of a contract to reach the common intent of two parties, and it does not seem to me that the same rules apply. What we are construing here is language of the insured designating the beneficiary of his bounty after his death. By the by-laws of the association he was given power to change this designation at any time before his death. The association reserved no right or power to object to any designation or change of designation, provided the beneficiary named was within those classes of persons to whom, by statute, charter, and its own by-laws the association was permitted to pay policies. Now, it must be conceded that, as those classes are limited by the law of Ohio, the terms used to describe them in the law must be construed according to the law of the State. Therefore the association had no power to agree to pay policies to any person not a member of the family of the insured or not an heir of the insured, as "family" and "heir" are defined by the law of Ohio. Within these classes, however, the association was entirely indifferent who the designated beneficiary might be. It is conceded that each of the claimants at the bar is within the requirement of the statute of Ohio. Subject to the limitation of the statute, the construction of the language of the designation becomes solely a matter of determining the intent of the insured. In other words, the language is to be treated as of a testamentary character, and is to receive, as nearly as possible, the same construction as if used in a will under the same circumstances. *Bolton v. Bolton*, 73 Me. 299; *Duvall v. Goodson*, 79 Ky. 224-228; *Mutual Ass'n v. Montgomery*, 70 Mich. 587, 38 N. W. 588; *Silvers v. Association*, 94 Mich. 39, 53 N. W. 935; *Chartrand v. Brace*, 16 Colo. 19, 26 Pac. 152; *Phillips v. Carpenter* (Iowa), 44 N. W. 898.

This designation was made in New York, by one domiciled in New York, for distribution to his family, most of whom lived in New York. If we were construing this language as a clause in a will, whether the money bequeathed were payable in New York or Ohio, there can be no doubt that the word "heirs" would be construed under the New York law, because that of the domicile of the testator. *Harrison v. Nixon*, 9 Pet. 483; *Anstruther v. Chalmer*, 2 Sim. 1; *Yates v. Thompson*,

3 Clark & F. 544; *Enohin v. Wylie*, 10 H. L. Cas. 1; *Wilson's Trusts* (*Shaw v. Gould*), L. R. 3 H. L. 55; *Parsons v. Lyman*, 20 N. Y. 103; *Freeman's Appeal*, 68 Pa. St. 151. Following this testamentary rule of construction, I have little difficulty in concluding that Greene intended that the language he used should be construed by the law of New York. Indeed, without the aid of authority, I should reach the same decision. Greene lived in New York, and all the possible objects of his bounty lived there. Is it reasonable to suppose that he would use language to describe them, intending it to be interpreted by the law of some other State? I cannot think so. Nor is there anything in the circumstances of his change of the beneficiary to lead to a different result. If the correspondence between the insured and the association at the time the beneficiary was changed is competent, it shows that he wished the proceeds of the policy to go to his estate, for he used the words "heirs, administrators, executors, and assigns." To this the association responded that the law of its creation forbade a designation to his "estate," but that he might designate his "heirs," which he did. This shows that his purpose was to leave it to those to whom it would go, were it part of his estate and he were to die intestate, and he used the word "heirs" as most nearly accomplishing that purpose. Had he been permitted to designate his estate as the payee, certainly the proceeds of the policy would have been distributed under the New York law. May we not presume that, with the same purpose in view, he intended that the designation he was permitted to make should receive a New York construction? The mere fact that he was cautioned that the Ohio law did not permit him to direct payment to his estate does not, it seems to me, show that he intended the words he used to receive an Ohio construction. He knew that the association did business outside of the State of Ohio. He knew that, so large was the number of New York certificate holders, the annual meeting of the association was held in New York. Was it not most natural for him to think that, so long as he designated persons within the limitation permitted by the Ohio law, the particular individuals named by him should be determined by giving to his language the meaning it would have at his home, where the money was ultimately to come and where the beneficiaries lived? We can be certain that Greene regarded the proceeds of this policy as part of his estate which he was leaving to be distributed at his death; and we may be sure that he did not distinguish between language used in the designation and that which he would have used in a will concerning his personal estate.

In *Mayo v. Assurance Soc.*, 71 Miss. 590, 15 South. 791, it was held that the proceeds of a policy of life insurance issued in New York, and payable to the heirs of the insured, who was domiciled in Virginia, were to be distributed under the laws of the latter State. In *Association v. Jones*, 154 Pa. St. 107, 26 Atl. 255, an association of Ohio, organized under exactly the same law as the complainant, issued a policy payable to the legal heirs of the insured, who was domiciled in Pennsylvania.

It was held that the court must determine who the legal heirs of the insured were by the law of his domicile, to wit, Pennsylvania. The court said (page 108, 154 Pa. St., and page 255, 26 Atl.):

"This contract is made with William D. Jones, of Philadelphia, and it fixes his domicile, and promises to pay the fund to his legal heirs. His domicile being thus here, a promise to pay to his legal heirs must be such as are determined by the intestate laws of such domicile."

In *Association v. Jones*, 154 Pa. St. 99, 26 Atl. 253, a policy was payable "to the devisees, or, if no will, to the heirs, of the said William Jones." The association was organized under the laws of Illinois. It was held that there was no disposition of the proceeds of the policy by the will. It was held that the word "heirs" meant those distributees to whom personal property of the insured would go if he died intestate. It was contended that the words should be given effect according to the law of Illinois, and as, by those laws, the husband's personal property would go to the widow in case of his intestacy, she was entitled to the whole fund. The court held that, as the policy was issued to Jones as a citizen of Pennsylvania, the promise to pay to his heirs must be treated as a promise to pay according to the intestate law of his domicile, and that it was a case for the application of the common-law rule "that personal property has no situs, but follows the person of the owner, and is distributed according to the intestate laws of such owner's domicile."

There are other cases in which the same result was reached, though no question seems to have been raised on the point by counsel or considered by the court. *Gauch v. Insurance Co.*, 88 Ill. 251; *Britton v. Supreme Council*, 46 N. J. Eq. 102, 18 Atl. 675. It may be noted, in connection with the two Pennsylvania cases just cited, that the policy in this case expressly insures the life of John G. Greene, of Schenectady, N. Y. I conclude, both on reason and authority, that the word "heirs," as used in the certificate or policy in the case at bar, is to be construed according to New York law.

And what does the word "heirs" mean, according to the New York law, used in a policy of life insurance? It is well settled in many States that where "heirs" is used, in a will or other document having a testamentary effect, to designate persons who are to receive personal property, it shall be held to mean those persons to whom the personalty of the giver would be distributed if he were to die intestate. Of course, as already said, technically it means those who would inherit the giver's real estate in case of his intestacy. But courts recognize that the word is given in common parlance — *ut loquitur vulgus* — a much wider meaning, and includes all those who would succeed, under the intestate laws of the State, to the enjoyment of the property in question. *Association v. Jones*, *supra*; *McGill's Appeal*, 61 Pa. St. 46; *Eby's Appeal*, 84 Pa. St. 241; *Sweet v. Dutton*, 109 Mass. 589; *Welsh v. Crater*, 32 N. J. Eq. 177; *Freeman v. Knight*, 2 Ired. Eq. 72; *Croom v. Herring*, 4 Hawks, 393; *Corbitt v. Corbitt*, 1 Jones, Eq. 114; *Henderson v. Henderson*, 1 Jones (N. C.), 221; *Alexander v. Wallace*, 8 Lea, 569;

Collier v. Collier's Ex'rs, 3 Ohio St. 369; Doody v. Higgins, 2 Kay & J. 729. . . .

With this construction, we must refer to the statute of distribution of New York to determine how the money in this case must go. Paragraph 2, § 75, tit. 3, of chapter 6 of the statutes of New York on wills and decedents' estates (4 Rev. St. [8th ed.], p. 2565) provides as follows:—

“That if the deceased leave no children the widow shall take a moiety of the personal estate.”

Paragraph 6 provides:—

“If the deceased shall leave no children and no representatives of them, and no father, and shall leave a widow and a mother, the moiety not distributed to the widow shall be distributed in equal shares to his mother, and brothers and sisters, or the representatives of such brothers and sisters.”

The decree of the court must be, therefore, an order distributing the proceeds of the policy, one-half to the widow, Sarah L. Greene, and one-half to be equally divided between the administrator of Mary Greene, the mother, and the brothers and sisters of John L. Greene, including, as one of the equally sharing distributees, the son of his deceased sister. The widow, Sarah L. Greene, will, of course, be charged with the \$1,000 already paid her by the complainant. The costs will be paid out of the fund.

BETHELL v. BETHELL.

SUPREME COURT OF INDIANA. 1876.

[*Reported 54 Indiana, 428.*]

WORDEN, C. J. Action by the appellee, against the appellant. The complaint contained two paragraphs. The first went out on demurrer. A demurrer for want of sufficient facts was filed also to the second, but was overruled, and exception taken. Such further proceedings were had as that final judgment was rendered for the plaintiff.

Error is assigned upon the overruling of the demurrer to the second paragraph of the complaint.

The second paragraph of the complaint alleges, that, on the 13th of May, 1869, by a deed of conveyance between the appellant and his wife and the appellee, all of whom were and had been citizens of War-

rick County, Indiana, for more than thirty years, the appellant granted, bargained, and sold to the appellee certain lands in Missouri, described by sections, etc., in consideration of four thousand eight hundred dollars.

The deed is copied into the paragraph, and contains the words "grant, bargain, sell, and convey," and purports to be upon a consideration of four thousand eight hundred dollars.

The paragraph then avers that, by the law of the State of Missouri at said date, the defendant, by said deed of conveyance, covenanted to and with the plaintiff that he was seised of an indefeasible estate of inheritance in fee simple, and that said defendant, by force of said law, might be sued upon the same in the same manner as if said covenant had been inserted in the deed.

The paragraph here sets out a section of the Missouri statutes, which corresponds with these allegations, and proceeds to allege, further, that at said date the defendant was not seised of an indefeasible estate of inheritance in fee-simple to said real estate, but, on the contrary, that he had not nor has he yet any title whatever to any part of said lands. That defendant was never at any time in possession of said lands, nor were they ever in the possession of the plaintiff; and that while the plaintiff was ignorant of said want of title, he paid a large amount of taxes on said lands, to wit, some eighteen months, after said conveyance.

The deed, as set out, contains no covenants whatever, either express or implied. There is no general warranty, as provided for by our statute. The words "grant, bargain, sell, and convey" do not imply any covenants in a conveyance in fee, though the words, "grant" or "demise" may imply a covenant of title, in a lease for years. This proposition was decided, after an exhaustive examination of the authorities, in the case of *Frost v. Raymond*, 2 Caines, 188. So that if the deed is to be regarded as containing the covenant of seisin, or, indeed, any other covenant, it must be by virtue of the law of Missouri, set out in the pleading.

Hence, the question arises, whether a deed, executed in Indiana, between her citizens, for land in another State, but containing no covenants whatever by the law of Indiana, shall be construed as containing, by implication, such covenants as would, by the law of the State where the land lies, be regarded as contained in the deed.

This is an interesting and a somewhat novel question. We have been furnished with able briefs by counsel for the respective parties, who have cited the general authorities upon the point, but yet no case has been found entirely in point.

There can be no doubt that the law of Missouri, alone, can be looked to in order to determine whether the deed in question was sufficient to pass the title. In the sale and conveyance of real estate, so far as regards the capacity of the parties to convey and hold, respectively, the formalities necessary to a valid transfer, the dominion and enjoy-

ment of the same by the vendee, and the right of succession thereto, and all other incidents to the acquisition of the land, the *lex rei sitæ* governs.

But it does not, therefore, necessarily follow that the *lex rei sitæ* so far governs conveyances made elsewhere as to change their character as mere conveyances and invest them with the character of personal covenants not necessary to the transmission of the property.

We are referred by the counsel for the appellee to the case of *McGoon v. Scales*, 9 Wall. 23, in which Mr. Justice Miller said: "It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated, we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

This was said, however, in reference to the question whether the title did actually pass by a certain deed. The question was, whether "the effect and construction" of the conveyance were such as to pass the title.

As we desire to decide nothing but the exact question presented here, and as the distinction between covenants running with the land and those not running with the land may perhaps be supposed to enter into the question, we proceed to consider the character of the covenant alleged to have been broken. The supposed covenant, of which a breach is alleged, is the covenant of seisin. And it is alleged that the land was never in the possession of the defendant or the plaintiff. There are some cases holding that the covenant of seisin runs with the land, where the grantor was in possession and delivered possession to the grantee. But all the cases, so far as we are advised, hold, that where the grantor is not in possession and does not deliver possession to his grantee, the covenant of seisin, if the grantor had no title, is at once broken and does not run with the land. In the case of *Chambers' Adm'r v. Smith's Adm'r*, 23 Mo. 174, it was held, that "If there be a total defect of title, defeasible and indefeasible, and the possession have not gone along with the deed, the covenant is broken as soon as it is entered into, and cannot pass to an assignee upon any subsequent transfer of the supposed right of the original grantee. In such case, the breach is final and complete; the covenant is broken immediately, once for all, and the party recovers all the damages that can ever result from it. If, however, the possession pass, although without right, — if an estate in fact, although not in law, be transferred by the deed, and the grantee have the enjoyment of the property according to the terms of the sale, the covenant runs with the land and passes from party to party, until the paramount title results in some damage to the actual possessor, and then the right of action upon the covenant vests in the party upon whom the loss falls."

The supposed covenant in this case, then, was one that did not run with the land; it was purely personal and broken as soon as entered into; it was not so connected with the land that any subsequent

grantee thereof could take advantage of it. The question is therefore narrowed down to this: can a deed, executed in Indiana, between citizens thereof, containing no covenants whatever according to the law of Indiana, be held by virtue of the law of Missouri, where the land lies, to contain a covenant not running with the land but broken as soon as entered into? We think this question must be answered in the negative. A covenant of seisin not running with the land is purely a personal covenant, broken as soon as made, and has nothing whatever to do with the transmission of the title to the land. As a general rule the *lex loci contractus* determines the construction and effect of contracts. And we think that where a deed is made, as above stated, the question whether it contains such a covenant is to be determined by the law of the place where it is made.

The case does not fall within another rule of law well established, viz., that where a contract is to be performed in a place different from that in which it is made, the law of the place of performance is to govern the contract. Here, the contract was completely executed and was not executory. By the terms of the deed there was nothing further to be done by the grantor, either in Missouri or elsewhere. There were no stipulations that bound him to the performance of any future act. Whatever title did or could pass by the deed passed immediately upon its execution and delivery, and there was nothing further to be done by the grantor.

As the deed was executed in Indiana, and as the parties resided therein, it would seem that they accepted the law of Indiana as the exponent of the rights conferred, and obligations imposed thereby, beyond the mere passing of the title. The case of *Thurston v. Rosenfield*, 42 Mo. 474, is closely analogous in principle. *Rosenfield* failed in business in New York, and in that State made an assignment of his effects, including certain real estate in Missouri, in which assignment certain creditors were preferred. The assignment was regularly executed and acknowledged, so as to pass the title to the land in Missouri, but according to the laws of Missouri it was void on account of the preference given to some of the creditors. But it was held, as the parties were residents of New York and New Jersey, and as the assignment was valid by the law of New York where it was executed, and as the policy of the Missouri law was to deny preferences in that State, that the assignment was governed by the law of New York, and it was upheld accordingly. See *Whart. Conf. Laws*, § 276.

The law of Missouri cannot extend beyond her territorial limits so as to make an instrument containing no covenants, executed in another State, between citizens thereof, contain such a covenant as that alleged here to have been broken.

The case of *Carver v. Louthain*, 38 Ind. 530, was an action upon the covenants contained in a deed for the conveyance of land situate in the State of Illinois. The question does not seem to have been made whether the covenants were governed by the law of Illinois, or other-

wise. But the case was decided upon the theory that the law of Indiana was applicable to it.

The case is, of course, less authoritative upon the point than if the question had been made.

We are of opinion that the second paragraph of the complaint failed to state facts sufficient to constitute a cause of action, and that the demurrer thereto should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

SECTION V.

EFFECT.

WAVERLY NATIONAL BANK v. HALL

SUPREME COURT OF PENNSYLVANIA. 1892.

[*Reported 150 Pennsylvania, 466.*]

HEYDRICK, J.¹ The plaintiff sues upon notes made by C. M. Crandall, one of the defendants, in his own name, and seeks to charge the other defendants as partners of Crandall in a business in which the proceeds of certain other notes, of which these were renewals, were used. The evidence relied upon to establish the alleged partnership is a contract in writing between Crandall of the one part, and the other defendants of the other part, dated February 24, 1885. If this contract does not create a partnership as to creditors it cannot be successfully contended that all the evidence in the cause taken together tends to charge anybody but Crandall; and inasmuch as all the assignments of error are predicated upon the assumption that such partnership was created by that contract, it is evident that if that assumption was unfounded the plaintiffs could not have been injured by the rulings complained of, and hence, though there may have been technical error therein, the judgment ought not to be disturbed. It is, therefore, pertinent to inquire what were the rights and liabilities of the parties under that contract, although the question is not directly raised by any of the assignments of error.

The whole scope of the contract indicates that a loan of money to Crandall by the other parties in consideration of a share of the profits of a business in which he was to embark was intended, and not a contribution to the capital of a partnership of which the parties were to be

¹ Part of the opinion only is given. — Ed.

the members. The parties of the second part covenanted to furnish three thousand dollars to Crandall, and not to a firm; they were to furnish it to him from time to time as he might require it, and its repayment to them was to be secured by a chattel mortgage upon the tools, machinery, furniture, and fixtures of every kind and nature belonging to or connected with the business in which it was to be used. Crandall might repay it at his option before the expiration of the full term for which he had the right to demand it; and, although it was stipulated that the money so to be furnished should be used in the business contemplated, the right of entire control of that business was recognized to be in, and was expressly conceded to Crandall. And it was further stipulated that nothing in the writing contained should be construed to create a partnership between the parties thereto except as to the profits of the business. These provisions are all consistent with the relation of borrower and lender, and some of them are inconsistent with any other relation. It is therefore manifest that that relation was intended to be established; and the next question is whether, in spite of the intention of the parties, the community of interest in the profits constituted them a partnership as to creditors.

If this were a Pennsylvania contract the question would be answered in the negative by the act of April 6, 1870, P. L. 56, and by *Hart v. Kelly*, 83 Pa. 286. But, although it was made in this State, it was to be executed in the State of New York. Such cases are stated by approved text writers to be an exception to the general rule that the *lex loci* applies in respect to the nature, obligation, and construction of contracts. That exception is thus stated by Judge Story: "But where the contract is either expressly or tacitly to be performed in any other place the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." *Conflict of Laws*, § 280. Chancellor Kent, after stating the exception in substantially the same terms, adds that it "is more embarrassed than any other branch of the subject (the *lex loci*) by distinctions and jarring decisions." 2 Com. 459. But whatever conflict of authority there may be in respect to the exception, all agree that matters connected with the performance of a contract are regulated by the law prevailing at the place of performance. *Brown v. Railroad Co.*, 83 Pa. 316; *Scudder v. Union National Bank*, 91 U. S. 406. Under the present contract it is clear there could be no liability to third persons without a performance as between the parties to it, and therefore the question of such liability would necessarily be connected with or grow out of such performance and be determinable by the law of New York.

More than a century ago Chief Justice De Grey, in *Grace v. Smith*, 2 Wm. Bl. 998, laid down the proposition that "every man that has a share of the profits of a trade ought also to bear his share of the loss." In a few years the principle thus stated became recognized as a part of the law of England, and so continued until 1860, when it was over-

thrown by the House of Lords in *Cox v. Hickman*, 8 H. L. C. 268. On this side of the Atlantic, and especially in the State of New York, it was accepted without question, so far as I have observed, as to the soundness of the reasons put forth in support of it, until it was exploded in England. . . .

It is said, however, in *Hackett v. Stanley*, 115 N. Y. 625, . . . that "exceptions to the rule (that participation in profits of a business renders the participant liable to creditors) are, however, found in cases where a share in profits is contracted to be paid, as a measure of compensation to employees for services rendered in the business, or for the use of moneys loaned in aid of the enterprise." It is not material to inquire how much more of the rule is left by this exception than was left by *Cox v. Hickman*. It is enough that the present case comes within the letter and the spirit of the exception. The parties who made the loan and who are now sought to be held liable as partners had no voice or part in the prosecution of the business either as principals or otherwise, nor had they an irrevocable right to demand a share of the profits as was the case in *Hackett v. Stanley*. The right of control, or any voice in the control, an incident of proprietorship, was denied to them. And the implication of partnership from community of interest in the profits was excluded by an express stipulation, the absence of which in *Hackett v. Stanley* was thought to be worthy of notice: and their right to demand a share of the profits was to terminate upon repayment of the money advanced at the end of five years, or sooner at the option of Crandall. In all its material provisions the contract under consideration is not distinguishable from that in *Curry v. Fowler*, 87 N. Y. 83, or from those provisions of the contract in *Hackett v. Stanley* which it is there conceded would create no other relation than that of borrower and lender.

For these reasons the defendants as to whom issue was joined are not liable to the plaintiff, and therefore the judgment must be affirmed.

BALDWIN v. GRAY.

SUPREME COURT OF LOUISIANA. 1826.

[Reported 4 *Martin, New Series*, 192.]

PORTER, J.¹ The facts in this case do not appear to be controverted; the only matter disputed is the legal obligations which arise on them.

The plaintiff was agent for the steamboat "*Fayette*," of which the defendant was part-owner. This action is instituted to recover the amount of an appeal bond, given in an action, wherein the owners of

¹ Part of the opinion only is given. — Ed.

this boat were defendants, and also for moneys paid for the expenses of the boat while in this port.

It is insisted the defendant is liable *in solido*, because the contract by which he became interested in this vessel was entered into at Pittsburg, in the State of Pennsylvania, where the common law prevails.

This law governs the obligation of the partners with each other, but not with third persons. It can no more affect the rights of those who contract with them in a different country, than particular stipulations between the partners could. The contract entered into in the case before us was made in this State, and must be regulated by the *lex loci contractus*. This is the general rule, and we know of no exception to it, unless the agreement is in respect to land in another country, or the performance is to be in another State. A foreigner coming into Louisiana who was twenty-three years old could not escape from a contract with one of our citizens by averring that according to the laws of the country he left he was not a major until he reached the age of twenty-five.

We think, therefore, that the defendant is only liable for his virile portion of the moneys laid out and expended on the steamboat "Fayette." *Caroll v. Waters*, 9 Mart. 500.

KING v. SARRIA.

COURT OF APPEALS, NEW YORK. 1877.

[Reported 69 New York, 24.]

FOLGER, J.¹ The plaintiffs seek to recover a sum of money from the defendant Sarria, upon contract. They do not show that he in person made with them the contract which they allege. It is, indeed, one of the conceded facts in the case, that the contract was made, as matter of fact, by persons other than Sarria. To succeed, then, in their action, they must show that those persons in some way represented Sarria, and had authority to bind him thereto, to the full extent to which the plaintiffs seek to hold him. To show such authority, proof is made that Sarria was a partner with Grau & Lopez, and that the latter two, under the firm name of Grau, Lopez & Co., made the contract. If nothing more appeared in the case, this would suffice for the plaintiffs; for, by virtue of the relation of partnership, one partner becomes the general agent for the other, as to all matters within the scope of the partnership dealings, and has thereby given to him all authority needful for carrying on the partnership, and which is usually exercised by partners in that business. *Hawken v. Bourne*, 8 M. & W. 703. Indeed, it is as agent that the power of one partner to bind his co-partner is obtained

¹ Part of the opinion only is given. — Ed.

and exercised. The law of partnership is a branch of the law of principal and agent. *Cox v. Hickman*, 8 H. of L. Cas. 268; *Baring v. Lyman*, 1 Story, 396; *Worrall v. Munn*, 5 N. Y. 229. In the case first above cited (8 M. & W. *supra*), it is added: that any restriction which by agreement amongst the partners is attempted to be imposed upon the authority which one partner possesses as the general agent of the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made. It is manifest, however, that this remark is to be qualified, when taken in connection with any statute law, which has provided for the formation of limited partnerships, where that statute law is operative. A due observance of such statutory provisions limits the liability of the special partner. It limits, too, the authority of the general partner, as the agent of the special partner, and fixes beforehand the extent to which, as agent, he may bind the special partner. It is hardly necessary to say that when a limited partnership is duly formed and carried on under our statute, though the general partner is the agent for all the partners, with powers full enough to transact all the business of the firm, and to bind it to all contracts within the scope of that business, he gets no authority, from his relation as partner and agent of the special member of the firm, to fix upon him any greater liability than that which has been stipulated for. These principles are stated here, not as new or forgotten by any one, but as the basis upon which the determination of this case will rest.

It turned out that the partnership of Grau, Lopez & Co. was created by a formal instrument in writing, and that, by its terms, the liability of Sarria was special, and limited in extent to a fixed amount. That instrument (it is found as fact by the learned referee), and all the doings of the three partners under it have been in due accord with the commercial code of Spain, of which nation they were citizens, and under whose government and laws they were living and acting when they executed the instrument, and formed and carried on the partnership. And it is proven and found as fact in the case, that when, in due pursuance of the Spanish law, a person has, as did Sarria, entered into such a partnership with others, and has, as did Sarria and his partners, duly observed and carried out the provisions of the law and the terms of their agreement, the liability of the special partner, as was Sarria, is limited to the amount of funds which he has contributed according to his agreement. It is well to observe here, that the learned referee has found that Sarria never had any partnership connection with Grau & Lopez, other than that of a limited partner; that he did not use, nor permit to be used, his name in the firm name; that he did not, by any representation, act, or omission, hold himself out, or render himself liable, as a general partner. We have then, Sarria himself making, in person, no contract with the plaintiffs, and giving a special and express authority only, to Grau & Lopez to make

one, which authority was in exact pursuance of law. Those who deal with one as agent do so at their peril, if it turns out that he had no authority from a principal; and where they rely upon his delegated authority as that of a partner, and know that the partnership was created in another country, must they not look to it, to see how far that law, and the partnership under it, gave power to the acting partner? As then, the power of Grau & Lopez to bind Sarria by contract was that of partners, that is, of agents; and as their authority was lawfully restricted, so that they could not bind him in a liability greater than that named in the contract of partnership, it seems to follow that the plaintiffs have no contract which can be enforced against Sarria, otherwise or further, than is provided for by the terms of that authority. Nor did Grau & Lopez make the contract with the plaintiffs in the name of Sarria, nor with any special claim of right to represent him. They made it in the name of Grau, Lopez & Co., and claiming only to represent that partnership. As to Sarria, the unnamed partner, they were agents, acting under an authority special, express, limited, and could give to the plaintiffs no more claim upon Sarria than such an authority empowered them. The plaintiffs were subject, in these dealings with Sarria, to the limitations which he had lawfully put upon the powers of his agents. Again, to state familiar doctrine, no one, in dealing with an agent, may hold the principal to a contract which was not within the authority of the agent to make; nor where there is an express written authority, is it to be enlarged by parol, or added to by implication. It is to be construed, as to its nature and extent, according to the force of the terms used, and the objects to be accomplished.

But it is claimed by the learned counsel for the plaintiff that the Commercial Code of Spain cannot have an extraterritorial effect; and that one dealing in this State, in which that law does not rule, cannot avail himself of its effect. If this be so, it must be because the law of this State forbids a foreigner, in such a case as this, from invoking the aid of any law of his domicil. But one country recognizes and admits the operation within its own jurisdiction of the laws of another, when not contrary to its own public policy, nor to abstract justice, nor pure morals. It does this on the principle of comity. It has been so long practised that it is stated as a principle of private international jurisprudence, that rights which have once well accrued by the law of the appropriate sovereign are treated as valid everywhere. Westlake on Priv. Int. Law, art. 58.

The principle, from which originates the influence exercised by the law of a foreign State, in determining the status or rights of its subjects in another country, is thus well stated. It is the necessary intercourse of the subjects of independent governments, which gives rise to a sort of compact, that their municipal institutions shall receive a degree of reciprocal efficacy and sanction within their respective dominions. It is not the statutes of one community which extend their controlling power into the territories of another; it is the sovereign of

each who adopts the foreign rule, and applies it to those particular cases in which it is found necessary to protect and cherish the mutual intercourse of his subjects, with those of the country whose laws he adopts. Per Sir Samuel Romilly, *arguendo*, *Shedden v. Patrick*, 1 Macqueen's H. of L. Cases, 554.

It cannot be said that there is a rule of exclusion, on account of this particular law being contrary to our public policy. It much resembles our own statute for the formation of limited partnerships, and, with some difference in detail, it aims at the same beneficial result, which ours has in view; nor may we say, with our statute before us, that the law is opposed to good morals or abstract justice. There cannot be that exclusion, because it is a rule of our law not to give in any case to a foreigner the benefit of the law of his domicile.

Mr. Nash was correct, in opening his argument, in saying that this is a case of first impression in this State. Hence it is, that in looking for the reasons upon which it is to be decided, we have to be governed by the analogies of the law, rather than cases in point. Let us see where those analogies tend. If one marry, where marriage is only a civil contract, his marital relation will be held valid, in a country where a religious ceremony is, by its law, deemed vital. The same principle prevails with us, though not called into application by such a state of facts. It is an established principle that the law of the place where contracts purely personal are made, must govern as to their construction and validity, unless they are made to be performed in another State or country. *Curtis v. Leavitt*, 15 N. Y. 227; *Chapman v. Robertson*, 6 Paige, 627. This contract of partnership was made to be performed in Cuba. The contract made by the partnership with the plaintiffs, it may be conceded, was made in New York, to be performed here. The contract with the plaintiffs will be construed and enforced by the laws of this State, and they will determine the nature and extent of the liability upon it, of the partnership, the maker of it. The former, the contract of partnership, between the members of the firm, will be construed and weighed by the laws of Spain, and they will determine the liability of Sarria, and the extent of the authority given by him to Grau & Lopez. In *Comm. of Ky. v. Bassford*, 6 Hill, 526, the Supreme Court of this State maintained an action on a bond, given to secure the payment of money, to be raised and distributed by a lottery, on the ground that it was a valid and legal obligation in Kentucky, where it was assumed that it was made, and where it was to be executed, though opposed to the statutory policy of this State. And the rule has been so far carried, in one jurisdiction, in recognizing the law of the domicile, as to enforce a claim of property in slaves. *Madrazo v. Willes*, 3 Barn. & Ald. 353; see also, *Greenwood v. Curtis*, 6 Mass. 358; *Com. v. Aves*, 18 Pick. 215; *The Antelope*, 10 Wheat. 66; and so far in another jurisdiction as to hold good a sale of lottery tickets in this State. *McIntyre v. Parks*, 3 Metc. 207.

There is a close analogy between this case and question arising as

to the authority of the master of a vessel to bind his owners in a foreign port. Though the solution of the latter depends upon the rules of the maritime law more particularly, yet the relation of the master and the owners is but a branch of the general law of principal and agent, and so the ultimate reason of each starts from the same root. It is not a new doctrine, that a master of a vessel cannot bind her owners in a foreign port, to any greater liability than will be recognized by the law of their domicile. *Pope v. Nickerson*, 3 Story, 465. And the rule there laid down has been recognized and applied in the Court of Queen's Bench, on the principle that the power of the master to bind the owners personally is but a branch of the general law of agency. *Lloyd v. Guibert*, 6 Best & Smith, 100; s. c. in Exch. Ch., id. That case, also, in its reasoning, recognizes the distinction which we have stated, between the law which is to affect the question of the authority to make a contract, and that which is to determine the validity and effect of the contract when made. It was urged there, too, by counsel, but without effect, that the law of the place where the contract was made, and of the place where it was to be performed, was different from the law of the domicile of the defendants. It was also urged that the contract entered into was *bona fide*, in the ordinary course of business by the master, and within the scope of his ostensible authority to contract; and that his power could not be narrowed by provisions of foreign law, unknown to the party dealing with him, more than by secret instructions, but urged without avail. So, also, in the case of *The Moxham*, 1 P. Div. 107, it is pertinently said: "One can understand that a contract between master and servant, or the relations between principal and agent, may affect a contract made by the agent, *qua* agent, with foreigners; that is to say, it may affect the nature and extent of his agency."

So, too, in actions of tort, it has been held that an extraterritorial law will furnish a defence in the courts of England. *Phillips v. Eyre*, Law Rep. 6 Q. B. 1. It is said that an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct, exceptional legislation. See also *Dobree v. Napier*, 2 Bing. N. C. 781.

The effect of the judgments in these cases is this: That where the essentials of a contract made under foreign law are not hostile to the law and policy of this State, the contract may be relied upon and availed of in the courts of this State. If the substance of the contract is against that law and policy, our judicatories will refuse to entertain it and give it effect. Hence, the contract of partnership made by *Sarría*, in Cuba, may be availed of by him here.¹

¹ *Acc. Barrows v. Downs*, 9 R. L. 446; *Hastings v. Hopkinson*, 28 Vt. 108.—Ed.

CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH COMPANY.

COURT OF APPEAL. 1890.

[Reported [1891] 1 *Queen's Bench*, 79.]

APPEAL from a judgment of DAY, J., on a preliminary issue.

In the year 1880 the plaintiff, who was a Brazilian subject and resident in Brazil, executed, in favor of one Broe, a stock-broker carrying on business in the city of London, a power of attorney to purchase and sell shares in public companies and public funds. The power of attorney was in the Portuguese language, and was executed by the plaintiff in Brazil with the formalities required by the Brazilian law. Broe, purporting to act under the power of attorney, disposed of certain shares in the defendant company which were the property of the plaintiff and registered in his name. Broe did not account to the plaintiff for the proceeds of the sale of these shares, the purchasers of which were registered as owners in the books of the company. The plaintiff issued an originating summons asking for the rectification of the register by inserting therein his name as holder of the shares, and an issue was directed to be tried by a jury in London to determine whether the plaintiff was entitled to have the register so rectified. Before this issue came on for trial an order was made that the question whether Brazilian or English law was to govern the construction of the power of attorney should be tried by a judge without a jury. The matter came on before DAY, J., who decided that English law was to govern the construction of the power of attorney, and a certificate to that effect was accordingly made out.

The defendants appealed.¹

LORD ESHER, M. R. In this case a person resident in Brazil and carrying on business there wrote down that which he intended to be an authority to an agent, if that agent would accept the delegation. The person whom he desired to be his delegate did afterwards accept that delegation. The question raised is, what is the meaning of that document? Now, I agree that it has one meaning, and no more; and the question is, what was the meaning of the plaintiff when he wrote that document? The court has to ascertain that meaning from a consideration of what it is that was written under the circumstances in which it was written; that is, in other words, having regard to the words used, and to the surrounding circumstances at the time they were used.

Now, this writing was a business document, written in Brazil in the Brazilian language, and with the formalities necessary according to the Brazilian law and custom, by a man of business carrying on business

¹ Arguments of counsel and concurring opinion of LINDLEY, L. J., are omitted.
— Ed.

in Brazil. An English court has to construe it, and the first thing, therefore, that the English court has to do is to get a translation of the language used in the document. Making a translation is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you would want a competent translator, competent to translate in that way, and, if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what is that meaning. Amongst those experts you might want a Brazilian lawyer; and a Brazilian lawyer for that purpose would be an expert. That is the first thing the court has to do. Then, when the court has got a correct translation into English, it has to do what it always has to do in the case of any such document, — either a contract, or such an authority as this, — that is to say, determine what is to be taken to be the meaning of the party at the time he wrote it, and what is to be inferred from the language which he has used. There are certain inferences which are adopted in ascertaining the meaning of the language used, unless in the particular instance the contrary intention appears. One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.

Now, applying those rules to the present case, the first thing to be

done is to get at the true construction of the language used in the authority. When the plaintiff used the Brazilian language in this document, he must have used it in the business sense given to it in Brazil. Therefore, that has to be ascertained; and then having got that, the equivalent in the English language must be found. Having got in English the equivalent of the Brazilian words, we have to see what the meaning of the language so used is. If it appears that the contract is to be performed in Brazil wholly, — that is to say, that the contract shall be performed according to Brazilian law, — that is the construction of it, and that is the meaning of the parties; but if it appears that it was to be wholly carried out in England, we should infer that the meaning of the parties and the true construction of the contract were that it was to be carried out according to English law. If we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that in any country where in fact it was to be carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting one construction only on the document, and not putting a different construction on it in different countries. The one meaning that he had was, “I give an authority which if carried out in England is to be carried out according to the law of England; if in France, according to the law of France.” That is one meaning, though this authority is to be applied in a different way in different places.

SECTION VI.

ASSIGNMENT.

LEE v. ABDY.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1886.

[Reported 17 Queen's Bench Division, 309.]

ACTION against the trustees of the Reliance Mutual Life Insurance Society on a policy of insurance upon the life of Ellis Laurence Lee, deceased, by an assignee of the policy.

The defence (*inter alia*) stated as follows: At the date of the alleged assignment of the policy the said Ellis Laurence Lee was, and he remained till his death, a merchant domiciled in Cape Colony, and

the plaintiff was his wife. The title to the policy money is governed by the law of the said colony, according to which the alleged assignment, if executed, was and is void both by reason of the alleged assignee being the wife of the said Ellis Laurence Lee, and by reason that the said Ellis Laurence Lee was, and remained till his death, insolvent, and that his creditors are entitled to the policy moneys.

The plaintiff in her reply objected that the above statements of the defence showed no defence in law. It was ordered by WILLS, J., that the question of law whether, assuming the facts stated in the defence to be true, the rights of the plaintiff under the assignment of the policy were governed by the law of Cape Colony or by that of England, should be disposed of before the trial, and that the policy should be produced on the argument. It appeared in the course of the argument to be an admitted fact that the assignment was executed in Cape Colony, though it was not expressly so stated on the pleadings.

It appeared from the policy that it was effected by the deceased, Ellis Laurence Lee, who was described therein as resident at Kimberley, in South Africa, with the society, which was a life insurance company in London. It recited that the proposal for assurance, and the usual declaration by the assured, had been delivered at the office of the society by him, and that the truth of the statements therein were to form the basis of the contract. The policy money, together with such further sum, if any, as might be apportioned by way of bonus to the policy, was to be paid within three calendar months after proof satisfactory to the directors had been given of the death of the assured having happened within the term of the insurance. The policy contained the usual clause to the effect that the funds of the society should alone be answerable for any demand under the policy.

DAY, J.¹ If it were necessary to determine where the assured was domiciled when the policy was entered into, or where the policy must be considered as having been made, or where it is payable, there might be some difficulty in doing so upon the facts so far as they at present appear before us; but in the view I take it is unnecessary to go into those questions. It seems to me that quite independently of those considerations the assignment of the policy was invalid. The subject-matter of the assignment is a chose in action which has no locality. The general rule, subject to exceptions which do not seem to me to apply to the present case, is that the validity and incidents of a contract must be determined by the law of the place where it is entered into. The assignment here in question is an assignment that exists if at all by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment. Now the contract in fact entered into by the parties to the assignment was entered into in Cape Colony, and the parties were domiciled there, and, as I have said, it had relation to a

¹ Arguments of counsel and the concurring opinion of WILLS, J., are omitted.—
Ed.

chose in action which has no locality. It is argued that the validity of this contract must be determined by the law of England. Why should that be so? The reason given is that the parties are contracting with reference to a contract which is affected by the law of England. That consideration seems to me to be immaterial. They are domiciled and are contracting in Cape Colony, and by the law of that colony, as it seems to me, the validity or invalidity of such contract must be determined. It was urged upon us that this conclusion would occasion great inconvenience to insurance companies. But I cannot see that much greater difficulty would arise in ascertaining whether an assignment was good according to foreign law than in the ordinary case of an assignment under English law. No doubt people are theoretically bound to know the law of their country, but in point of fact in many cases they do not, and there might often be difficulties in ascertaining whether an alleged assignment according to English law had been validly effected. I do not think that any additional difficulty occasioned by the assignment being governed by foreign law is of so much moment as was suggested. We were pressed with the authority of the case of *Lebel v. Tucker*, Law Rep. 3 Q. B. 77, but the decision there had relation to a bill of exchange, and I do not think that case is analogous to the present. It seems to me that the question which really arises here is one of the validity of a contract which is purely foreign, though such contract has relation to a chose in action which possibly arises upon an English contract. For these reasons I think our judgment must be for the defendants.¹

WILLIAMS v. COLONIAL BANK.

COURT OF APPEAL. 1888.

[*Reported 38 Chancery Division, 388.*]

COTTON, L. J.² These are two appeals, one in each action. Each action was brought by the executors of the late Mr. Williams, one against the Colonial Bank, and the other against the Chartered Bank of Australia. Each action was to prevent the defendant bank from dealing with and claiming as its own certain shares in an American railway company, the New York Central and Hudson River Railroad Company.

Mr. Williams at the time of his death was the owner of 1210 shares in that company, which were standing in his name, and his executors

¹ *Acc. Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651. But see *Brown's Appeal*, 125 Pa. 303, 17 Atl. 419. — Ed.

² Parts of the opinions given and the concurring opinion of BOWEN, L. J., are omitted. — Ed.

shortly after his death desired that those shares should be transferred from the name of the testator into their own names in the books of the company. Those shares, in parcels of ten, were represented by certificates, and the executors sent those certificates to Messrs. Thomas, who were brokers in London, for the purpose of their getting the shares transferred into the names of the executors. At first they did not sign the power of attorney on the back of the certificates, the certificates were sent back to them, and the two executors who had then proved signed the power of attorney on the back of the certificates, leaving it in blank, not naming any attorney nor filling in the name of any one as the person to whom the shares were to be transferred. The shares were not transferred into the names of the executors, and a member of the firm of brokers used the certificates for his own purposes. At first he deposited the whole of them with the Colonial Bank, as a security for money due to them from his firm. In the year 1883, two years and a half after the certificates had been signed and left with the brokers, the brokers got some of these certificates back from the Colonial Bank, and the same member of the firm deposited them for an advance with the Chartered Bank of Australia. In 1884 the firm became bankrupt, and inquiries were made by the executors as to what had become of their certificates which they had left with the firm up to that time, and apparently without inquiry, except an inquiry made in December, 1882, when the fraudulent member of the firm told them that the certificates were quite safe in America. They found that these certificates were not in the possession of the brokers, but of the banks, and the banks claimed to be entitled to them according to American law. The plaintiffs brought their actions to assert their title to the shares. At the time when the actions were commenced the shares were still standing in the name of the testator, and the certificates were in the same state as when handed to Thomas & Co. Mr. Justice Kekewich decided in favor of the defendants, and dismissed both actions. The question before us is, was he right in so deciding?

I will first say a few words as to the nature of these certificates. On the face of them each is a certificate that Mr. Williams was entitled to ten shares of \$100 each in the capital stock of the railroad company, transferable in person or by attorney in the books of the company only on the surrender and cancellation of this certificate by an indorsement thereof hereon in the form and manner prescribed by the regulations of the company. Then on the back there was this: [His Lordship read the indorsement.] The two executors who had proved signed these indorsements, leaving the names of the transferee and of the attorney in blank. The banks contend that, according to American law, and by the delivery of these certificates with signed transfers upon them, they became entitled both at law and in equity to the shares which are represented in the certificates as belonging to the testator; and that as the means were given to them of requiring a transfer by

the company of the shares into the name of the transferee, though as against the company they cannot be considered as having the rights of shareholders till their names are entered in the books of the company, yet as between transferor and transferee they have both the legal and equitable title. According to English law of course they would have no legal title. They would have a mere inchoate title, which, according to English law would not enable the transferees to hold the shares as against the executors who are the legal owners, but it appears that according to American law the transferee has not only an equitable title but a legal title to the shares. . . .

Now the question here whether Thomas & Co. gave the banks a good title to the certificates depends on transactions in England, and must be decided by the law of England, and not by the law of America. The law of America, in my opinion, is properly referred to for the purpose of deciding what would be the effect of a valid effectual transfer of the certificates on the title to shares in an American company, but whether Thomas & Co. transferred to the banks a good title to the certificates depends on transactions in England, and in no way depends on the law of America. So also the question whether the plaintiffs have been estopped by any act of theirs from questioning the title of the transferees of Thomas & Co. must be a question of English law. . . .

LINDLEY, L. J. I am of the same opinion, and were it not that all cases of this kind are of the greatest importance, I do not know that I should consider it necessary to say anything, but when we have to decide which of two innocent people is to suffer from the fraud of a third it is necessary to be very careful and to take great pains to assure ourselves that the party against whom we decide is, according to law, in the wrong.

First of all, let me dispose of the questions as to American law. As I understand the evidence given by the American lawyers, if this transaction had taken place in America the banks would have got a good title to these shares, subject possibly to the question about the documents not being properly attested. I doubt very much whether the American lawyers would have attached much importance to that, and I shall assume throughout my judgment that if this transaction had taken place in America the banks would have succeeded. Now, the American law is important up to a certain point, but not beyond that point. We must look to the American law for the purpose of understanding the constitution of the railway company and the proper mode of becoming a shareholder in it. Moreover, it may be that the consequences of having acquired a title to the certificate may depend on American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all. One question, and to my mind the main question, resolves itself into this, — Who is entitled to these certificates? Now the certificates have been dealt with by the executors in England, and the

certificates are chattels, and when we are considering who is entitled to a chattel bought or sold or pledged in England, it is English law and not American law that is to govern the case.¹ . . .

JACKSON v. TIERNAN.

SUPREME COURT OF LOUISIANA. 1840.

[Reported 15 Louisiana, 485.]

MARTIN, J.² This is an action to recover the sum of two thousand four hundred dollars, with six per cent interest per annum, according to the laws of Maryland, on an assignment, for a valuable consideration, by one Thomas H. Fletcher, to the plaintiff of this sum, to be paid by the defendants, from so much of the proceeds of a shipment of tobacco made to them by Fletcher, who was indebted to the plaintiff. The latter took this assignment without any other security, against a protested bill of exchange, for the same amount, on being shown the receipts of the agent of the defendants, that Fletcher owed them nothing, and that the consignment of tobacco had actually been made. The assignment was made on the 21st of May, 1819, at Nashville, and the defendants resided in Baltimore. . . .

The counsel for the plaintiff has shown that although the assignment of a debt would be disregarded by, or rather would not be enforced in the common law courts of the State of Maryland, which is the *locus solutionis*, yet the assignment even of a part of a debt would be enforced in the Courts of Chancery in that State: provided the debtor assented thereto; or an obligation, resulting from the assignment of a part of the debt may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract. As, for example, the deposit of money in a bank; the proceeds of a crop sent by a planter to his commission merchant for sale; or those of a shipment of produce to a consignee or factor in Baltimore, Liverpool, or Havre, which is the present case. See the case of Poydras v. Delamare *et al.*, 13 La. Rep. 98; Mandeville v. Welch, 5 Wheat. 277. See also 2 Story's Eq. Jur. § 1044; 3 Swanst. Rep. 393; Tiernan v. Jackson, 5 Pet. 598.

The plaintiff had, therefore, an equitable right, on this assignment, in the State of Maryland. The courts of this State are bound to enforce equitable rights. These rights are to be tested by the *lex loci contractus*, though the remedy here must be sought according to our laws, to wit, the *lex fori*.

¹ See Masury v. Arkansas Nat. Bank, 87 Fed. 381, *ante*, p. 181. — ED.

² Part of the opinion only is given. — ED.

SECTION VII

PERFORMANCE.

JACOBS v. CRÉDIT LYONNAIS.

COURT OF APPEAL. 1884.

[Reported 12 Queen's Bench Division, 589.]

BOWEN, L. J. The plaintiffs in this case are esparto merchants carrying on business in the city of London, and the defendants are a banking firm also carrying on business in the city.

By a contract made in London on the 6th of October, 1880, the defendants agreed to sell to the plaintiffs 20,000 tons of Algerian esparto, to be shipped from Algeria during the year 1881 by monthly deliveries on board ships or steamers to be provided by the plaintiffs, payment to be made by cash on arrival of the ship or steamer at her port of destination. The defendants delivered a portion of the esparto under the contract, but failed to deliver the remainder; and this action was brought by the plaintiffs for its non-delivery. The defendants in their statement of defence admitted the non-delivery complained of, but alleged that the insurrection in Algeria and the military operations connected with it had rendered the performance of the contract impossible; and that by the French Civil Code, which prevails throughout Algeria, *force majeure* is an excuse for non-performance. The plaintiffs demurred to this defence on the ground that the contracts were governed by English law and not by the law of Algeria, and further alleged that the defendants or their agents could have procured and shipped esparto from other parts of Algeria where *force majeure* did not exist. The defendants to the latter allegation rejoined that the insurrection and military operations rendered it impossible to transport such esparto as last mentioned to the place fixed in the contract for approval by the plaintiffs of its quality before shipment, or to transport the same to the place fixed in the contract for shipment. To this rejoinder there was a further demurrer upon similar grounds. The Queen's Bench Division having given judgment upon both demurrers for the plaintiffs, the case now came before us upon appeal.

The question which we have in substance to consider is, whether non-performance of their agreement by the defendants can be excused on the ground that military operations in Algeria and the Algerian insurrection had rendered its performance impossible, and that such an excuse would have been recognized by the French Civil Code which prevails in Algeria, in conformity with the following section as translated from

the French: "There is no ground for any damages when by means of a superior force or an accident the obligor has been prevented from giving or doing that which he was bound to give or do, or has done that which he was not bound to do." The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. What is to be the law by which a contract, or any part of it, is to be governed or applied, must be always a matter of construction of the contract itself as read by the light of the subject-matter and of the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or *primâ facie* rules that are capable of being displaced, wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties. "The general rule," says Lord Mansfield, "established *ex comitate et jure gentium* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom." *Robinson v. Bland*, 1 W. Bl. 258 (see *Peninsular and Oriental Steam Navigation Co. v. Shand*, 3 Moo. P. C. (N. S.) 291). This principle was explained by the Exchequer Chamber in the case of *Lloyd v. Guibert*, Law Rep. 1 Q. B. 122, as follows: "It is generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract." It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties or the place where the contract is made. The place of performance is necessarily in many cases the place where the obligations of the contract

will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction, to the effect that the law of the place of fulfilment of a contract determines its obligations. But this maxim, as well as the former, must of course give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases, no doubt, where a contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this *primâ facie* view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances. Again, it may be that the contract is partly to be performed in one place and partly in another. In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal. In the present case the contract was made in London between merchants carrying on their business in the city of London, and payment was to be made in London. Presumably, therefore, we should infer that this was an English contract and intended to be governed by English law; but it still remains to be considered whether anything in the contract itself or the nature of its stipulations displaces this *primâ facie* view either wholly or in part. Now it cannot be contended that the parties have in express terms provided that any portion of this contract is to be construed or applied otherwise than according to English law; but it was suggested by the appellants that such an intention ought to be inferred from certain provisions as to the collection of the esparto in Algeria and as to its shipment thence. The esparto was to be shipped by the Compagnie Franco-Algerienne, or their agents, from Arzew, or any other port with safe anchorage, by sailing ships or steamers during the year 1881. The quality of the esparto was to be finally approved by the plaintiffs' representatives at the works of the Compagnie Franco-Algerienne, at Ain-el-Hadjar, in Algeria, before being baled, and no claim respecting quality was to be allowed after the delivery of the bales at Arzew. The necessary ships or steamers were to be supplied by the plaintiffs, otherwise the esparto was to be warehoused by the Compagnie Franco-Algerienne at the plaintiffs' peril and risk. Insurance was to be effected by the

defendants for the invoice amount at selling price, and 2 per cent over in the United Kingdom on the usual conditions. Payment to be made by cash on arrival of the ship or steamer at port of destination. Finally the contract contained an arbitration clause, with a provision that it should be made a rule of the High Court of Judicature on the application of either of the contracting parties.

There is absolutely nothing in any part of this contract, as it appears to us, which can amount to an indication that it is in any way or in any part of it to be treated as anything except an English contract, unless it be the mere fact that the esparto is to be collected in Algeria, approved at the works of a French company in Algeria before shipment, and to be delivered on board ships of the plaintiffs at an Algerian port, after which it is to be at plaintiffs' risk. To hold that on this ground only the ordinary presumption is to be displaced, and that the parties must have meant some law other than the English to govern the construction of any portion of the contract as regards the liabilities of the contracting parties, would be to introduce a serious element of uncertainty into mercantile contracts. The mere fact that a contract of this description, — made in England between English resident houses, and under which payment is to be made in England upon delivery of goods from up country in an Algerian port, — is partly to be performed in Algeria, does not put an end to the inference that the contract remains an English contract between English merchants, to be construed according to English law, and with all the incidents which English law attaches to the non-performance of such contracts.

Now one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one), a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by *vis major*.

"The rule laid down in the case of *Paradine v. Jane*, Aleyn, 27, has often," says Lord Ellenborough, "been recognized in courts of law as a sound one; that when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." *Atkinson v. Ritchie*, 10 East, 530, at p. 533. See also *Spence v. Chodwick*, 10 Q. B. 530; *Lloyd v. Guibert*, Law Rep. 1 Q. B. 121. If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of the inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would, in the absence of an expressed or implied intention to that effect, be contrary to authority as well as principle, see *Barker v. Hodgson*, 3 M. & S. 267; *Sjoerds v. Luscombe*, 16 East, 201. The Solicitor-General, in his argument, admitted that he was driven to contend that the law of the place of fulfilment not merely governed the mode of performance of this particular contract,

but governed also the obligations in respect of performance, and the liabilities in respect of non-performance of it. It seems to us, however, that the true principles of construction to be applied do not admit of this interpretation of this contract. To what extent foreign law is to be incorporated in any contract must be, as we have said, a question of construction of the contract itself read by the light of the surrounding circumstances. If a contract made in England by English subjects or residents, and upon which payment is to be made in England, has to be performed in part abroad, it might not be unreasonable to assume that the mode in which any part of it has to be performed abroad was intended to be in accordance with the law of the foreign country, and to construe the contract as incorporating silently to that extent all provisions of a foreign law which would regulate the method of performance, and which were not inconsistent with the English contract. But it cannot be gathered from such a contract as the present that the parties desired to go further and to discharge the defendants from performance whenever circumstances arose which would, according to foreign law, excuse them. The contract has absolutely provided that delivery of the esparto shall be duly made, not that the bargain as to such delivery need only be observed when the foreign law would insist upon such observance. The contract being an English contract, only such portions of the French Civil Code can be applied to its provisions as to performance in Algeria as are not inconsistent with the express language of the contract as interpreted according to English law. If the parties had wished, in addition to this, to incorporate a provision of French law which in the event of *vis major* would operate to excuse the contracting parties for non-performance, and thus to vary the natural construction of the instrument according to English law, they should have done so in express terms. Read by English law the contract is not susceptible of such an interpretation, and there is nothing to show that in this respect the parties desired the contract to be governed by the French.

For these reasons we are of opinion that the judgment of the court below was right and must be affirmed with costs.

Judgment affirmed.

R. CHILDS.

OF MASSACHUSETTS. 1896.

[Massachusetts, 406.]

of the purchase price for horses sold

Answer, payment. Trial in the
fore BLODGETT, J., who reported the
court, in substance as follows.

ed. In May, 1893, the plaintiff, at
ork, sold to the defendant Childs cer-
over the horses at Fredonia. The
plaintiff one thousand dollars in cash
the horses. The plaintiff forthwith
ant at Fredonia, but the defendant
pay anything towards the purchase
later, the defendant sent by mail from
a \$675 in cash, to be applied on the
later, the defendant sent to the plain-
tonia his promissory note for \$325,
the from date.

understanding at any time between the
the renewal notes hereinafter men-
plaintiff in payment of the balance
can be implied from the facts herein
became due, the defendant renewed it
the first in all terms except the date.
mail from Boston to Fredonia, and
the interest due on the first note to
the plaintiff returned the first note, on
ned the second note and the payment

has ever been paid, nor any interest
to court and tendered to the defend-
er was refused.

evidence at the trial, with evidence
ork so far as the same was applicable

the defended, objected to the admission
ork, and requested the judge to rule
receipt of the notes set forth in the
solely by the law of this Common-
judge to rule as follows: —

first note is to be presumed to have
existing debt or not is a question to
ers of Massachusetts.

"2. Upon the agreed facts and the pleadings, it is to be presumed that the first note was given by the defendant and received by the plaintiff in payment and satisfaction of the pre-existing debt due the plaintiff for the purchase price of the horses.

"3. Upon all the evidence, the plaintiff is not entitled to recover.

"4. Upon all the evidence, it is to be presumed that the second note was given by the defendant and received by the plaintiff in payment of the first note."

The judge refused to give any of the rulings requested, and found for the plaintiff.¹

ALLEN, J. The defendant Childs contends that the notes given to the plaintiff were Massachusetts contracts, and that they should be interpreted and have effect according to the law of Massachusetts. That would be so if a question arose in an action upon the notes, or either of them. *Shoe & Leather National Bank v. Wood*, 142 Mass. 563. But the present action is brought on the original contract, and not on either of the notes. The plaintiff seeks to recover what the defendants agreed to pay him as the price of the horses sold. The defendants' promise was made in New York, and was to be performed there. They were bound to make payment in that State, and the question is whether they have done so. They paid a part in cash, and for the residue they sent by mail from Massachusetts to the plaintiff in New York their note made in Massachusetts and payable here. By the law of Massachusetts a negotiable note taken for an antecedent debt is deemed to be a payment, unless there is something to show a contrary intention. The rule in New York is the other way. The plaintiff in New York was not affected by the rule which prevails here. The defendant's promise to pay him in that State remained unperformed and undischarged, according to the law of that State. It makes no difference that successive notes were given. The plaintiff was to be paid there, and he has not yet been paid according to the law of New York, and is entitled to recover. *Vancleef v. Therasson*, 8 Pick. 12; *Rosseau v. Cull*, 14 Vt. 83; *Winsted Bank v. Webb*, 89 N. Y. 325; *Olcott v. Rathbone*, 5 Wend. 490. Story, *Conf. of Laws*, § 332. *Judgment for the plaintiff.*²

¹ Part of the statement of facts is omitted. — Ed.

Where a note is given in payment at the place where the original debt was contracted and is payable, the question whether it is to be taken as a discharge of the original debt is of course to be determined by the law of the place. This is commonly said to be governed by that law because the note was there accepted as payment. *Bartsch v. Atwater*, 1 Conn. 409; *Thompson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 53 N. W. 1137; *Gilman v. Stevens*, 63 N. H. 342. — Ed.

BENNETT v. CLEMENS.

SUPREME COURT OF PENNSYLVANIA. 1868.

[Reported 58 Pennsylvania, 24.]

THIS was an amicable action of assumpsit to December Term, 1866, in which John Clemens was plaintiff and Isaac R. Benners, survivor of the firm of Isaac R. Benners & Co., defendant. The claim was for a balance due by defendant on an invoice of fruit, contracted for in England and shipped to defendant to New York. The whole amount of the shipment was \$2,967.85, which was reduced to \$896.95 by quercitron bark shipped to plaintiff. The plaintiff claimed to recover this balance at gold prices with interest from December 17th, 1863. The only question in the case was whether it was to be paid on that basis.¹

The verdict was for \$1,456.65, the whole amount of the plaintiff's claim. The defendant took a writ of error.

THOMPSON, C. J. The debt sued for was a debt contracted in England, or rather the balance of a debt contracted and partially liquidated there by returns in quercitron bark. In the absence of any understanding to the contrary the balance was due and payable there. This being so, it was payable in the legal currency of the country, denominated pounds, shillings, and pence, and the representative of gold. Of course, as any payment obtained here would be payable in legal tender notes, the value of the gold in legal tenders, with interest, would be what in amount the judgment should be. The *lex loci contractus* must control in interpreting the contract. *Allshouse v. Ramsay*, 6 Whart. 331; *Watson v. Brewster*, 1 Barr, 381, and authorities cited by the defendant in error. This view of the case is sufficient to affirm the judgment without reference to any question arising on our Legal Tender Acts. *The judgment being right in amount is affirmed.*²

GRAHAM v. FIRST NATIONAL BANK.

COURT OF APPEALS, NEW YORK. 1881.

[Reported 84 New York, 393.]

FINCH, J.³ The ownership of one hundred and ninety-six shares of stock, which stood upon the books of the Norfolk Bank, in the name of Eliza A. Graham, must be deemed vested in her, whether the purchase price was paid by her or by her husband, and notwithstanding

¹ Part of the statement of facts and arguments of counsel are omitted. — Ed.

² *Acc. Grunwald v. Freese* (Cal.), 34 Pac. 73; *Comstock v. Smith*, 20 Mich. 338; 8 Clunet, 447 (Brescia, 4 Nov. '78); 8 Clunet, 448 (Florence, 21 May, '70); 23 Clunet, 597 (Marseilles, 25 June, '95). — Ed.

³ Part of the opinion only is given. — Ed.

the evident control of it, for his own purposes, by the latter. No creditors of the husband intervene to affect the question, and, as between Mrs. Graham and the bank, her right as owner must be admitted. The dividends declared during such ownership belonged to and were payable to her; and, assuming for the present that her assignment to plaintiffs was effective to transfer such right to them, there remain for discussion only the two questions: whether the Norfolk Bank did, in fact, pay the dividends sued for to the husband of Mrs. Graham; and whether, by such payment to him, the liability of the bank to her was discharged. The referee has found that such payments were, in fact, made to James Graham, the husband. . . . While the facts are not free from difficulty, a careful examination has satisfied us that there was sufficient evidence to warrant the finding of the referee, and to make it conclusive on this appeal.

The question of law, however, remains, whether the payment by the bank to James Graham was a good payment to his wife in whose name the stock stood upon the books of the bank. The Norfolk Bank was located and transacted business in the State of Virginia. It is proved that in that State the common law prevails as it respects the relation of husband and wife, and that within that jurisdiction the husband has the absolute right to reduce to his own possession, and use for his own benefit, the personal property of the wife. The contract out of which grew the right to the dividends was both made and to be performed in Virginia, and if the payment by the Bank of Norfolk to James Graham is to be tested and measured by the law of that State, it is conceded to have been good and an effective discharge of the liability to the wife. It is denied, however, that the law of Virginia applies, and it is argued that the law of Maryland, the *lex domicilii*, governs and controls the capacity of the parties to receive payment, and the duty of the bank in making it. The general subject of a conflict between the law of the domicil and that of the place of contract has been fully discussed by Story and Wharton in their respective treatises. Story on Conflict of Laws, § 374 *et seq.*; Wharton, § 393 *et seq.* Whatever is useful in the learning of the continental jurists, or the decisions of the English courts, has been made tributary to conclusions which we may safely follow where, at least, they are in harmony with the ruling of our own tribunals. It must, then, be granted that movables or personal property, by a fiction of the law, are deemed attached to the person of the owner, and so, present at his domicil, whatever their actual situation may be. The law of the domicil, therefore, naturally governs their transfer by the owner, and their disposition and distribution in case of his death. So far the authorities substantially agree, differing only in the reasons upon which the rule is founded, and by which it is to be justified. When, however, the question passes beyond the disposition of the personal property by the party, or the act of the law, within the jurisdiction of the domicil, and busies itself with the inherent character of the property, and of the contracts which both create and constitute

it, elements of discord arise, and the authorities are not easily to be reconciled. It is readily seen that the inherent character of the contract must usually be the product of the jurisdiction in which it originates, and hence it follows, and has been justly held, that the construction, nature, and effect of a contract are to be determined by the *lex loci contractus*. Story on Conflict of Laws, § 321. But no such question is here. There is no dispute about the construction of the contract to pay dividends. All are agreed upon that. There is no trouble as to the nature of the contract or its effect. Its validity, and the duty of payment to the stockholders, is conceded on all sides. The real question is over the performance of the contract, or its discharge by payment; and that involves the capacity of the husband to receive and discharge the debt, represented by the dividends, *jure mariti*. On the one hand, it is argued that this question of capacity, of the rights and powers flowing from the marriage relation, is dependent upon the law of the domicile, and utterly unaffected by the foreign law, and the former must, therefore, dictate and measure the authority and power of the husband and the right of the wife. That is, in general, true as between themselves, and relatively to each other. It does not follow that it is true as between them and a debtor in another State, whose contract was made there, and is there to be performed. Such a fact introduces a new element into the problem. It would scarcely be endurable if a railroad or insurance company, declaring dividends in this State, should be bound to pay stockholders in other States according to the foreign laws, and in accordance with different and varying codes. Observing the evil result, we must remember that, in a case like the present, it is a legal fiction which attaches the property to the domicile, and the actual fact may be otherwise. Judge Comstock, in *Hoyt v. The Commissioners of Taxes* (23 N. Y. 228), well says, "that the fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action." And Judge Story says that the legal fiction "yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined." Conflict of Laws, § 550. And hence has been very steadily sustained the general rule that a contract made in one State, and to be performed there, is governed by the law of that State, and the further rule, which is a logical result, that a defence or discharge, good by the law of the place where the contract is made or to be performed, is to be held, in most cases, of equal validity elsewhere. Story on Conflict of Laws, § 331; *Thompson v. Ketcham*, 8 Johns. 189; *Bartsch v. Atwater*, 1 Conn. 409; *Smith v. Smith*, 2 Johns. 285; *Hicks v. Brown*, 12 Johns. 142; *Sherrill v. Hopkins*, 1 Cow. 108; *Peck v. Hibbard*, 26 Vt. 702; *Bowen v. Newell*, 18 N. Y. 290; *Cutler v. Wright*, 22 N. Y. 472; *Waldron v. Ritchings*, 8 Daly, 288; *Jewell v. Wright*, 30 N. Y. 259; *Willits v. Waite*, 25

N. Y. 577. In these cases the fiction yields to the fact; the situs attached theoretically to the person of the owner, and, therefore, to his domicile surrenders to the actual situs where justice and convenience demand it. The illustrations are various, but founded upon a common reason and justification. For the purpose of taxation the actual situs controls, and the fiction which carries the personal property to the domicile of the owner is disregarded. As to days of grace affecting the maturity of a contract and determining when it becomes due, the *lex loci* is applied. The defence of infancy is to be sustained or denied according to the rule of the place of contract and performance. So, also, as to the disability of coverture, and the rate and legality of interest. And even an assignment, *in invitum*, compelled by the local law, will transfer property in another State where suitors in the courts of the latter are not thereby prejudiced. These rulings and others of the like character have been modified and moulded in their application by the influence of varied circumstances, but concur in the general principle upon which the *lex loci* has been applied. The point pressed here is that while it controls the construction and validity of the contract, it does not settle the capacity of the non-resident parties. But to found a ruling upon such a test would involve us in an ambiguity. Capacity may affect the power of transfer and the direction and details of distribution. In that respect it is often shaped and settled by the law of the domicile. But it also affects the validity of a contract and the mode and manner of its dissolution or discharge. In that respect it is generally governed by the law of the place of contract. Story concludes, after a full and learned review of the insuperable difficulties which attend an effort to extend the capacity or incapacity created by the law of the place of domicile to foreign States, that the true rule is that "the capacity, state, and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired, and contracts made in the place of their domicile, touching property situate therein," but as to acts done, etc., elsewhere, the *lex loci contractus* will govern in respect to capacity and condition. We cannot make, therefore, the law of the domicile in and of itself a solvent of the doubts and difficulties likely to arise even as to questions of capacity. In the present case the contract was made in Virginia and to be performed there. The dividends were there declared and payable. They were paid to the husband who could lawfully receive and appropriate them, by the law of Virginia, to his own use and benefit. The payment was, therefore, valid and effectual, and discharged the bank from its liability. The rights of the wife after such payment, as between herself and her husband under the law of Maryland, might prove to be a very different question. It is sufficient for the purposes of this case that the payment, which the referee finds was in fact made to the husband, discharged the liability of the bank and furnished a defence to the action.

The judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

SECTION VIII

DISCHARGE.

GIBBS v. SOCIÉTÉ INDUSTRIELLE.

COURT OF APPEAL. 1890.

[Reported 25 *Queen's Bench Division*, 399.]

LORD ESHER, M.R.¹ In this case the defendants, a French company, entered into negotiations for the purchase of copper through a London metal-broker, who effected contracts between them and the plaintiffs in England in the ordinary way. He drew up bought and sold notes, by which the contract was expressed to be according to the rules of the London Metal Exchange. One of these notes he sent to the plaintiffs, and the other he sent to the defendants; and both parties retained the notes so sent to them. The contracts were for the purchase of copper to be delivered in England. It appears to me impossible to deny that these were English contracts. The contracts being so made, the defendants became bound to accept the copper contracted to be sold. The plaintiffs were always ready and willing to deliver the copper; but the defendants were not ready to accept, and absolved the plaintiffs from tendering it. Consequently, according to English law, the plaintiffs are entitled to sue the defendants for non-acceptance of the copper, the measure of damages being the difference between the contract and market price at the time of the breaches of contract. But the defendants are a French company domiciled in and governed by the law of France. They have been, by a judgment of the Tribunal of Commerce of the Seine, pronounced to be in judicial liquidation. It was asserted by the defendants by way of defence to the action that the pronouncing of that judgment by the French tribunal by the law of France operated as a discharge of the defendants from liability to an action on the contracts; and it was asserted that it so discharged them in more than one way. It was said that such a judgment dissolved the French company, so that it no longer existed, and so dissolved their liability to be sued on the contracts. It was further said, that the fact of the plaintiffs having by their agents offered proof of their claims before the French tribunal operated as a discharge of the defendants' liability to this action. It was further said, as to part of the claim, that by the law of France, where a company is in liquidation as in the present case, and there is a contract for the acceptance of goods by

¹ Part of this opinion only is given. Concurring opinions were delivered by LINDLEY and LOPES, L.JJ. — ED.

such company at a date subsequent to the judgment of liquidation, the vendors cannot prove for damages for the non-acceptance; they can elect to deliver the goods to the liquidator and prove for the price; but, if they do not so elect and the goods are not delivered, the effect is that the contract is cancelled and the purchasers discharged. Such are the contentions set up by the defendants by way of defence. Then they raise a further point. They say that the judgment against the defendants ought not to have been pronounced, but the judge ought to have stayed the proceedings before judgment, or that, on giving judgment, he ought to have stayed further proceedings generally. The plaintiffs contend, that there was no discharge of the defendants from their obligations under the contract, according to the law of France; but they go further, and contend that, assuming that there was such a discharge by reason of the liquidation proceedings, and that such discharge was for this purpose equivalent in France to a discharge in bankruptcy according to English law, yet such discharge would be no answer to an action in England upon an English contract. We have to decide the questions so raised, or such of them as it may be necessary to decide for the purposes of this case. The question really is, whether anything has been proved which is an answer to the plaintiffs' action in this country according to the law of England. It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say "applicable to it as a contract" to exclude mere matters of procedure, which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the

country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said, in *Smith v. Buchanan*, 1 East, 6, it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied. The proposition contended for seems to me to contravene the general principle to which I have alluded as governing these matters, and to suggest a principle for which there is no foundation in law or reason. Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound? Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract. I should say, too, that, if the contract had been made in any foreign country other than France, the plaintiffs could sue upon it in this country, and their action would not be affected by the law of France. In that case the law of such other foreign country would govern the contract. That would be the conclusion I should come to, even supposing that the propositions stated by the defendants as to the law of France were in fact made out. It is not necessary, in the view I take, to determine whether they were or not. I must say that I do not think it was clearly made out that, in any of the modes suggested, the defendants were by the law of France discharged from liability. I wish to base my judgment, however, on the assumption that they were so discharged. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicile is altogether outside the general principle that governs such matters, and cannot be supported.¹

¹ Acc. *Blanchard v. Russell*, 13 Mass. 1; *May v. Breed*, 7 Cush. 15; *Smith v. Smith*, 2 Johns. 235. — Ed.

FELCH v. BUGBEE.

SUPREME JUDICIAL COURT OF MAINE. 1859.

[Reported 48 Maine, 9.]

KENT, J.¹ The questions between the plaintiff and the principal defendants relate to the effect of a discharge in insolvency, granted to the defendants by the proper tribunal under the laws of Massachusetts. It appears from inspection of the papers that the discharge was regularly granted, and, by its terms, includes the contract as set forth in each of the notes in suit. The question arises, whether such a discharge is effectual to bar this action.

Both notes were made in Boston, payable to defendants' own order, signed and indorsed by them to citizens of Massachusetts, who, at Boston, negotiated and sold them to the plaintiff, before maturity, and before the commencement of proceedings in insolvency. The first of these notes contains no specification of any place of payment; the second is payable at any bank in Boston. . . .

The second note . . . is made payable at any bank in Boston; and it is contended that this stipulation takes the case out of the principles of the former decisions, and makes it subject to the discharge offered in evidence; and that a contract, although with a citizen of another State, is barred if it is payable in the State where the debtor resides and has obtained his discharge.

The other questions being disposed of, the only remaining one is, whether the fact that the note is made payable in Massachusetts gives efficacy to the discharge, although the contract is with a citizen of another State.

We will first consider the authorities bearing on this precise point.

In *Scribner v. Fisher*, 2 Gray, 43, a majority of the court in Massachusetts decided that such a note is barred by a discharge in insolvency in that State. This decision has been reaffirmed in several cases decided subsequently in that court. 5 Gray, 539, and note. No reasons are assigned in the subsequent cases. They rest on the case of *Scribner v. Fisher*, in which Metcalf, J., gave a dissenting opinion. But this is now established as the doctrine of that court.

In the case of *Demerit v. Exchange Bank* (Law Reporter, March, 1858), Judge Curtis held, "that it is not competent for the State of Maine, under the Constitution of the United States, to pass any law discharging or suspending the right of action on a contract made with a citizen of another State by a citizen of Maine. This was settled in *Ogden v. Saunders*, 12 Wheat. 213, and *Boyle v. Zacharie*, 6 Pet. 848." "It is urged," says Judge Curtis, "that where the contract is to be performed in the State, it is not within *Ogden v. Saunders*. It

¹ Part of the opinion only is given. — ED.

has been so held in *Scribner v. Fisher*, 2 Gray, 43. But I cannot concur in that opinion. I consider the settled rule to be that a State law cannot discharge or suspend the obligation of a contract, though made and to be performed within the State, when it is a contract with a citizen of another State. Such was Justice Story's understanding of the decisions of the Supreme Court of the United States in which he took part. *Springer v. Foster*, 2 Story, 387."

Mr. Justice Story has also expressed the same view of the law in his elementary works. In his *Conflict of Laws*, § 341, he says, "that a discharge under any law of the State where made will not operate to discharge any contracts except such as are made between citizens of the same State." *Very v. McHenry*, 29 Maine, 214.

The Court of Appeals in New York, in 1852, in the case of *Donnelly v. Corbett*, 3 Seld. 500, had this precise question before them,— the contract being payable in South Carolina, where the debtor resided and was discharged,— the creditor being of New York. The court held that an action on the contract was not barred by a discharge. The ground of the decision was, that a discharge, under a State insolvent law, of a debtor from his debts contracted after its passage, is valid as respects contracts between citizens of the State, but invalid as to all contracts where a citizen of another State is a party. The same doctrine is found in *Poe v. Duck*, 5 Md. Rep. 1.

In *Anderson v. Wheeler*, 25 Conn. 613, the case presented the same question as the one before us,— the original parties to the note were both of New York, it was indorsed before due to a citizen of Connecticut, it was payable at a bank in New York, where the payee obtained his discharge in insolvency. The court refers to the case of *Scribner v. Fisher*, but dissents from it, and decides that the fact of the place of payment being designated does not take it out of the rule as laid down in Judge Johnson's opinion, concurred in by a majority of the court, in *Ogden v. Saunders*.

We have also the opinion of Mr. Justice Baldwin of the Supreme Court of the United States, in the case of *Woodhull v. Davis*, Baldwin's Rep. 300. His decision is based on the position that bankrupt or insolvent laws can have no extraterritorial effect on persons beyond the limits of the State or nation.

The decisions which are in opposition to the cases in Massachusetts rest upon the understanding of the doctrine in the original case of *Ogden v. Saunders*. All the courts, including that of Massachusetts, state and national, agree, as a starting-point, that whatever is clearly and expressly decided in that case is to be taken as settled, although the reasoning may not be entirely satisfactory. That case, indeed, resembles the works of some ancient authors, where the commentaries, and doubts, and explanations outrun the text and overwhelm it, leaving the bewildered student "in wandering mazes lost,"— oftentimes the "interpreter being the harder to be understood of the two."

Mr. Justice Woodbury, in the case of *Town v. Smith*, 1 Wood. &

Minot, 187, discusses fully the authorities bearing on the whole question, and, although doubting some of the views, and the soundness of the reasoning on which they are based, yet feels bound by the authority of the cases in the Supreme Court of the United States, which he understands as establishing the test of citizenship of the parties.

The discussions and decisions, have, however, resulted in bringing about a general agreement as to all the points first enumerated, leaving this single point of the place of performance yet, in a measure, in controversy.

The Supreme Court of the United States was called upon to revise and interpret the leading case of *Ogden v. Saunders*, and the judges gave their opinions on the various questions raised, in *Cook v. Moffat*, 5 How, 309. Whilst there is an almost painful difference of opinion on the question of the soundness of the grounds assumed or reasons assigned, the court concurs in fixing certain principles as finally established. The one bearing on the exact point before us is thus stated: "A certificate of discharge under an insolvent law will not bar an action brought by a citizen of another State, on a contract with him."

This is the state of the authorities on the subject. The preponderance seems clearly against giving efficiency to the discharge in a case like this.

If we leave the authorities and seek beyond them for the reasons on which any rule on this subject is founded, we find two trains of argument, which, starting from different premises, lead to directly opposite results. The whole controversy on this point seems to turn upon the question whether it is the contract itself, including the place of making and of performance, and the *lex loci contractus*, that is to govern, or whether the citizenship of the contracting parties controls, without reference to the nature or place of making or performance of the contract.

It is urged by those who favor the first view, that, when a foreigner, or a citizen of one State, voluntarily comes into another State, and there makes a contract with a citizen of the latter State, not by its terms to be performed elsewhere, the *lex loci* attaches to the contract, and must not only govern its construction, but its validity, and the grounds or facts by which it may be discharged. The argument is, that every contract made has relation to the existing law of the State, and (to apply the doctrine directly to the case before us) that, when such a contract is made within the territorial jurisdiction of Massachusetts, the liability to a discharge under the existing insolvent laws becomes a part and parcel of that contract, incorporated into it, or attached to it, as a condition or limitation, and goes with it everywhere, whoever makes or becomes a party to it, at any time. In this view, citizenship is of no consequence. The ground on which insolvent laws of a State, which allow a full discharge of a contract, are sustained against the objection that they impair the obligation of contracts, and thus violate the provision of the United States Constitution, is that above stated, viz.: that the liability to such discharge is either

expressly or tacitly understood by the parties, as a part of, or a fixed attendant upon, all contracts made under the overshadowing canopy of the statute of insolvency; and that any citizen of another State, who comes voluntarily within the territory thus embraced, must be held to contract with reference to the law, and that the enforcement of it would not violate his rights.

If this were a new question, this view of the case would certainly be entitled to great consideration. It will, however, be observed, that the strength of this argument rests upon the doctrine of the *lex loci contractus*, the place of *making* the contract, not the place of *performance* only or chiefly. It is the fact of making a contract on a territory governed by a certain law that incorporates the law into it, if it is thus incorporated. And it would seem, that if it is not citizenship, but place, that is to control, those who favor this view should have taken their stand upon the ground that every contract made in the State, and not expressly to be performed elsewhere, must be governed by the existing law. But this has been given up by all the courts. Even the court in Massachusetts admits that the fact that the contract was made in that State cannot bar recovery, after a discharge in insolvency. The place of making is treated as immaterial. *Dinsmore v. Bradley*, 5 Gray, 487; *Houghton v. Maynard*, 5 Gray, 552; 10 Met. 694, and numerous other cases. The same court has decided that a contract made in Georgia, and there to be performed, between two citizens of Massachusetts, would be barred by a discharge in Massachusetts. *Marsh v. Putnam*, 3 Gray.

The question naturally arises, why the place of performance of a contract should subject it to the operation of a discharge, when the place of its formation would not. If the place of performance is material, and must control, it must be because the party out of the State voluntarily assented to the condition fixing the place, thereby bringing the contract under the law of the State. The same reasoning would apply to the making of a contract which might be performed in the State. When the fact of the place of making the contract is not regarded as essential, the citadel, as it seems to us, is surrendered, and it is vain to attempt to make a stand upon the place of performance alone.

It is conceded by the court in Massachusetts that the forum makes no difference; that the same rule applies everywhere. And, after a careful consideration of the reasonings and decisions of the court on this vexed subject, we can only say that, if the question were an open one in all respects, we might incline to the doctrine that the place of making and the place of performance should control, on the grounds before stated, rather than the fact of naked citizenship. Yet we are forced to the conclusion that a different rule has been finally established by the Supreme Court of the United States, and concurred in by most of the State courts, and we are not disposed to depart from the rule thus established. That rule is the one found in *Cook v. Moffat*, 5 How.

before cited. It rests entirely upon the citizenship of the party, and not at all upon the place of making or performance. It is the result of that train of reasoning which regards the insolvent laws of a State as local, having no extraterritorial force so as to act upon the rights of citizens of other States; and which holds that, as between citizens of the State, the discharge will bind them as to all posterior contracts, wherever made or wherever to be executed; and, as to citizens of other States, will not discharge any existing contract, although made or to be performed in the State granting the discharge. Or, as expressed by the court, the discharge is not a bar "when the action is brought by a citizen of another State." This rule is broad enough to exclude all questions arising from either the place of making or place of performance. It rests entirely upon the citizenship of the parties, and treats all other matters as immaterial.

The plaintiff must have judgment on both notes.¹

PHOENIX NATIONAL BANK v. BATCHELLER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1890.

[Reported 151 *Massachusetts*, 589.]

HOLMES, J. This is an action by a Rhode Island national bank, upon a promissory note payable in Massachusetts, and made here by the defendants, citizens of this State. The defence is a discharge in insolvency in this State. It is admitted that the plaintiff did not prove its claim upon the note, and the only question is whether, under these circumstances, the discharge is a bar. It was argued for the defendants, that the decisions of the Supreme Court of the United States that discharges in such cases are not generally valid against citizens of other States do not go upon any constitutional ground, but upon mistaken views of what is called private international law, and therefore are not binding upon us; and we were asked to reconsider *Kelley v. Drury*, 9 Allen, 27, in which this court yielded its earlier expressed opinion, and followed the precedent of *Baldwin v. Hale*, 1 Wall. 223. See also *Guernsey v. Wood*, 130 Mass. 503; *Maxwell v. Cochran*, 136 Mass. 73.

There is no dispute that the letter of the discharge and of our statute covers the plaintiff's claim; Pub. Sts. c. 157, §§ 80, 81; and the argument in favor of giving them effect according to their letter is, that unless the statute is void we are bound to follow it; that the law of the

¹ Acc. *Baldwin v. Hale*, 1 Wall. 223; *Rhodes v. Borden*, 67 Cal. 7, 6 Pac. 851; *Anderson v. Wheeler*, 25 Conn. 603; *Hawley v. Hunt*, 27 Ia. 303; *Newmarket Bank v. Butler*, 45 N. H. 236; *Phelps v. Borland*, 103 N. Y. 406; *Main v. Messner*, 17 Or. 78, 20 Pac. 255; *Roberts v. Atherton*, 60 Vt. 563, 15 Atl. 160. — Ed.

place where the contract is made and is to be performed, which is in force at the time of making and for performing it, enters into the contract so far as to settle everywhere what acts done at that place shall discharge it (*May v. Breed*, 7 Cush. 15); and that a discharge in accordance with that law cannot be said to impair the obligation of a contract which contemplated it, or to deprive the contractee of property without due process of law when that property was created subject to destruction in that way.

We express no opinion upon the weight of this argument. Although it formerly prevailed with this court (*Scribner v. Fisher*, 2 Gray, 43; *Burrall v. Rice*, 5 Gray, 539), it may be that there is a distinction as to a discharge by legal proceedings. It may be that statutes providing for a discharge by an insolvency court do not enter into the contract in such a sense as to bind the contractee to adopt and submit himself to the jurisdiction as an implied condition of the promisor's undertaking. It does not follow, because the discharge, if effective, does not impair the obligation of the contract, that absolute liability to it is a part of the substantive obligation. The substantive promise and the obligation of the contract are different things; and apart from this consideration it may be that by sound principle the plaintiff is to be taken to have subjected itself to Massachusetts proceedings only to the extent that, if the Massachusetts courts could acquire jurisdiction over it in the ordinary modes by which jurisdiction of the person is acquired, it would be bound everywhere by a discharge granted here.

However this may be, we see no sufficient reason for departing from what has been accepted as the law for a quarter of a century. We agree that, consistently with our duty, we cannot yield our opinion upon new questions not subject to the final jurisdiction of the Supreme Court of the United States solely out of a desire for uniformity. But when we are asked to overrule a decision of our own court which has been acquiesced in for so long, we should have to be very sure, before doing so, not only that the decision was wrong, but also that the Supreme Court of the United States, whatever we may think about it, either would not regard our decision as subject to review by them, or would abandon opinions which they have expressed repeatedly, and down to the latest volume of their reports.

We should hesitate to overrule *Kelley v. Drury*, even if we were ready to say that we disagreed with the principle of *Baldwin v. Hale*, and that we thought our decision not subject to review. For when in a particular case the precedents are settled in favor of uniformity, the fact that they do conform to the decisions of the Supreme Court of the United States is a most powerful secondary reason for not disturbing them, and would be likely to outweigh our private opinions upon the original matter. There is, too, a particular reason for uniformity in the present case, because it is manifest that, practically at least, the general validity of the discharge, that is, its effect outside this Commonwealth, depends upon the decision of other courts than this, and

that the decision of the United States Court upon that question is of more importance than that of any other.

The often repeated view of the Supreme Court of the United States is, that discharges like the present are void for want of jurisdiction, and that statutes purporting to authorize them are beyond the power of the States to pass. *Baldwin v. Hale*, 1 Wall. 223, 233; *Baldwin v. Bank of Newbury*, ib. 234; *Gilman v. Lockwood*, 4 Wall. 409; *Denny v. Bennett*, 128 U. S. 489, 497; *Cole v. Cunningham*, 133 U. S. 107, 115. Whether that court would regard a decision to the contrary by a State court as subject to review by them upon constitutional grounds, does not appear very clearly from any language of theirs which has been called to our attention, unless it be the following, repeated in *Baldwin v. Hale*, 1 Wall. 223, 231, from *Ogden v. Saunders*, 12 Wheat. 213, 369: "But when, in the exercise of that power, the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States and with the Constitution of the United States." This is somewhat emphasized as the deliberate view of the court, not only by its original mode of statement, but by their adhesion to it after the dissent of Chief Justice Taney in *Cook v. Moffat*, 5 How. 295, 310. See *Scribner v. Fisher*, 2 Gray, 43, 47.

This language certainly gives the impression that our decision would be regarded as subject to review, possibly on the ground of an implied restriction on the power to pass insolvent laws reserved to the States (*Denny v. Bennett*, 128 U. S. 489, 498); possibly on the ground that the discharge would impair the obligation of contracts with persons not within the jurisdiction (*Cook v. Moffat*, 5 How. 295, 308); possibly by reason of the Fourteenth Amendment (*Pennoy v. Neff*, 95 U. S. 714); possibly on some vaguer ground. We feel the force of the reasoning quoted from *Stoddard v. Harrington*, 100 Mass. 87, 89, but that case did not profess to weaken the authority of *Kelley v. Drury*, and, moreover, the question which we are now considering is not what would be our own opinion, but what seems to be the opinion of the Supreme Court of the United States.

The decision in *Kelley v. Drury* did not go upon any nice inquiry whether it was subject to review, but upon the ground that this court deferred to the decision of the Supreme Court of the United States, that discharges like the present were not binding outside the jurisdiction, and that, this being so, a discrimination should not be made in favor of our citizens in proceedings in the State court in distinction from proceedings in the courts of the United States.

This last proposition was conceded by the senior counsel for the defendant. But as some doubt was thrown upon it in the printed brief, we repeat what was again intimated in *Murphy v. Manning*, 134 Mass. 488, that there is nothing in the law affecting the question before us

which indicates an intent to refuse foreign creditors access to the courts of Massachusetts as a merely local rule of procedure, or otherwise than as a consequence of the substantive right having been barred by the discharge. The form of the discharge in the Pub. Sta. c. 157, § 80, and the language of § 81, address themselves directly to the substantive right, and declare the debtor discharged from the specified debts. It being settled that the plaintiff's debt is not barred, an action can be maintained to recover it in a State court.

*Judgment for the plaintiff.*¹

CANADA SOUTHERN RAILWAY v. GEBHARD.

SUPREME COURT OF THE UNITED STATES. 1883.

[*Reported 109 United States, 527.*]

Suits (commenced in the Supreme Court of the State of New York and removed to the Circuit Court of the United States for the Southern District of New York), by holders of mortgage bonds of the Canada Southern Railway Company, and of extension bonds, to recover on their extension bonds and on the interest coupons on their mortgage bonds. The following are the facts as stated by the court:

What is now known as the Canada Southern Railway Company was originally incorporated on the 28th February, 1868, by the legislature of the Province of Ontario, Canada, to build and operate a railroad in that province between the Detroit and Niagara rivers, and was given power to borrow money in the province or elsewhere and issue negotiable coupon bonds therefor, secured by a mortgage on its property, "for completing, maintaining, and working the railway." Under this authority the company, on the 2d of January, 1871, at Fort Erie, Canada, made and issued a series of negotiable bonds, falling due in the year 1906, amounting in all to \$8,703,000, with coupons for semi-annual interest attached, payable, principal and interest, at the Union Trust Company, in the city of New York. To secure the payment of both principal and interest as they matured, a trust mortgage was executed by the company covering "the railway of said company, its lands, tolls, revenues present and future, property and effects, franchises and appurtenances." Every bond showed on its face that it was of this kind and thus secured.

Before the 31st of December, 1873, the company became satisfied that it would be unable to meet the interest on these bonds maturing in the coming January, and so it requested the holders to fund their coupons falling due January 1, 1874, July 1, 1874, and January 1, 1875, by converting them into new bonds payable on the 1st of

¹ *Acc. Fareira v. Keevil*, 18 Mo. 166. See *Chase v. Henry*, 166 Mass. 579. — *Ed.*

January, 1877, and by so doing only, in legal effect, extend the time for the payment of the interest, without destroying the lien of the coupons under the mortgage, or otherwise affecting the obligation of the old bonds. Some of the bondholders funded their coupons, in accordance with this proposition, and accepted the extension bonds, but, under the arrangement, their coupons were not to be cancelled until the new bonds were paid.

In this condition of affairs the Parliament of Canada, on the 26th of May, 1874, enacted that the Canada Southern Railway, which was the railway built by the Canada Southern Railway Company under its provincial act of incorporation, "be declared to be a work for the general advantage of Canada," and a "body corporate and politic within the jurisdiction of Canada," for all the purposes mentioned in, and with all the franchises conferred by, the several incorporating acts of the legislature of the province. This, under the provisions of the British North America Act, 1867, passed by the Parliament of Great Britain "for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof," made the corporation a Dominion corporation, and subjected it to the legislative authority of the Parliament of Canada.

On the 15th of March, 1875, another series of bonds, amounting in the aggregate to \$2,044,000, or thereabouts, was issued and secured by a second mortgage to trustees. After the issue of all the bonds the company found itself unable to pay its interest and otherwise financially embarrassed, and a joint committee, composed of three directors and three bondholders, after full consideration of all the circumstances, submitted to the company and to the bondholders "a scheme of arrangement of the affairs of the company," which was approved at a meeting of the directors on the 28th of September, 1877. This scheme contemplated the issue of \$14,000,000 of thirty-year bonds, bearing three per cent interest for three years and five per cent thereafter, guaranteed, as to interest, for twenty years, by the New York Central and Hudson River Railroad Company, the first coupons being payable January 1, 1878. These new bonds were to be secured by a first mortgage on the property of the company, and exchanged for old bonds at certain specified rates. The old bonds of 1871 were to be exchanged for new at the rate of one dollar of principal of the old for one dollar of the new, nothing being given either for the past due coupons or the extension bonds executed under the arrangement in December, 1873. The proposed issue of bonds was large enough to take up all the old indebtedness at the rates proposed, whether bonded or otherwise, and leave a surplus, to be used for acquiring further equipment, and for such other purposes of the company as the directors might find necessary. This scheme was formally assented to by the holders of 108,132 shares of the capital stock out of 150,000; by the holders of the bonds of 1871 to the amount of \$7,332,000 out of \$8,703,000; and by the holders of \$1,590,000 of the second series of bonds out of \$2,029,000 then outstanding. Upon the representation

of these facts to the Parliament of Canada, the "Canada Southern Arrangement Act, 1878," was passed and assented to in the Queen's name on the 16th of April, 1878.

This statute, after reciting the scheme of arrangement, with the causes that led to it, and that it had been assented to by the holders of more than two-thirds of the shares of the capital stock of the company, and by the holders of more than three-fourths of the two classes of bonds, enacted that the scheme be authorized and approved; that the new bonds be a first charge "over all the undertaking, railway works, rolling stock, and other plant" of the company, and that the new bonds be used for the purposes contemplated by the arrangement, including the payment of the floating debt. Section 4 was as follows:

"4. The scheme, subject to the conditions and provisos in this act contained, shall be deemed to have been assented to by all the holders of the original first mortgage bonds of the company secured by the said recited indenture of the fifteenth day of December, one thousand eight hundred and seventy, and of all coupons and bonds for interest thereon, and also by all the holders of the second mortgage bonds of the company secured by the said recited indenture of the fifteenth day of March, one thousand eight hundred and seventy-five, and of all coupons thereon, and also by all the shareholders of the Canada Southern Railway Company, and the hereinbefore recited arrangement shall be binding upon all the said holders of the first and second mortgage bonds and coupons, and bonds for interest thereon respectively, and upon all the shareholders of the company."

Under the arrangement thus authorized the New York Central and Hudson River Railroad Company executed the proposed guaranty, and the scheme was otherwise carried into effect.

The several defendants in error were, and always had been, citizens of the State of New York, and were, at the time the scheme of arrangement was entered into and confirmed by the Parliament of Canada, the holders and owners of certain of the bonds of 1871, and of certain extension bonds, these last having been delivered to them respectively at the Union Trust Company in the city of New York, where the exchanges were made, in December, 1873. Neither of the defendants in error assented in fact to the scheme of arrangement, and they did not take part in the appointment of the joint committee. Their extension bonds have never been paid, neither have the coupons on their bonds of 1871, which fell due on the first of July, 1875, and since, though demanded. The company has been at all times ready and willing to issue and deliver to them the full number of new bonds, with the guaranty of the New York Central and Hudson River Railroad Company attached, that they would be entitled to receive under the scheme of arrangement.

These suits were brought on the extension bonds and past due coupons. The company pleaded the scheme of arrangement as a defence, and at the trial tendered the new bonds in exchange for the

old. The Circuit Court decided that the arrangement was not a bar to the actions, and gave judgments in each of them against the company for the full amount of extension bonds and coupons sued for. To reverse these judgments the present writs of error were brought.

WAITE, C. J.¹ That the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country. The obligor of the bonds and coupons here sued on was a corporation created for a public purpose, that is to say, to build, maintain, and work a railway in Canada. It had its corporate home in Canada, and was subject to the exclusive legislative authority of the Dominion Parliament. It had no power to borrow money or incur debts except for completing, maintaining, and working its railway. The bonds taken by the defendants in error showed on their face that they were part of a series amounting in the aggregate to a very large sum of money, and that they were secured by a trust mortgage on the railway of the company, its lands, tolls, revenues, etc. In this way the defendants in error, when they bought their bonds, were, in legal effect, informed that they were entering into contract relations not only with a foreign corporation created for a public purpose, and carrying on its business within a foreign jurisdiction, but with the holders of other bonds of the same series, who were relying equally with themselves for their ultimate security on a mortgage of property devoted to a public use, situated entirely within the territory of a foreign government.

A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty" (*Bank of Augusta v. Earle*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad v. Koontz*, 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf v. Rundel*, 103 U. S. 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul v. Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and

¹ Part of the opinion is omitted. — Ed.

purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

No better illustration of the propriety of this rule can be found than in the facts of the present case. This corporation was created in Canada to build and work a railway in that Dominion. Its principal business was to be done in Canada, and the bulk of its corporate property was permanently fixed there. All its powers to contract were derived from the Canadian government, and all the contracts it could make were such as related directly or indirectly to its business in Canada. That business affected the public interests, and the keeping of the railway open for traffic was of the utmost importance to the people of the Dominion. The corporation had become financially embarrassed, and was, and had been for a long time, unable to meet its engagements in the ordinary way as they matured. There was an urgent necessity that something be done for the settlement of its affairs. In this the public, the creditors, and shareholders were all interested. A large majority of the creditors and shareholders had agreed on a plan of adjustment which would enable the company to go on with its business, and thus accommodate the public, and to protect the creditors to the full extent of the available value of its corporate property. The Dominion Parliament had the legislative power to legalize the plan of adjustment as it had been agreed on by the majority of those interested, and to bind the resident minority creditors by its terms. This power was known and recognized throughout the Dominion when the corporation was created, and when all its bonds were executed and put on the market and sold. It is in accordance with and part of the policy of the English and Canadian governments in dealing with embarrassed and insolvent railway companies and in providing for their reorganization in the interest of all concerned. It takes the place in England and Canada of foreclosure sales in the United States, which in general accomplish substantially the same result with more expense and greater delay; for it rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganization of the affairs of the corporation under a new name brought about. It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who

are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows Congress "to establish . . . uniform laws on the subject of bankruptcy throughout the United States." Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries. The fact that the bonds made in Canada were payable in New York is unimportant, except in determining by what law the parties intended their contract should be governed; and every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations.

On the whole, we are satisfied that the scheme of arrangement bound the defendants in error, and that these actions cannot be maintained.

HARLAN and FIELD, JJ., dissented.

SECTION IX.

SPECIAL FORMS OF OBLIGATION.

(A) MERCANTILE INSTRUMENTS.

ORY v. WINTER.

SUPREME COURT OF LOUISIANA. 1826.

[Reported 4 *Martin*, New Series, 277.]

PORTER, J.,¹ delivered the opinion of the court. This case was heard last June, and judgment pronounced at that term. Doubting the correctness of our former judgment, we granted a rehearing, and the case has been argued again, and has received all the elucidation of which we believe it is susceptible.

The action was instituted on a promissory note made at Natchez, payable to one Lloyd Gilbert, and by him indorsed to the plaintiff and appellee.

It is shown by a statute of the State of Mississippi, that the maker of a note, in that State, may set up any equitable defence against a *bona fide* indorsee which he could offer against the payee. Laws of Mississippi, 464.

The first question in the cause is, by what laws should this contract be governed? The plaintiff contends, that as the note was indorsed in this State, and to a citizen of it, that the rights of the parties must be ascertained by the laws of Louisiana.

We are clearly of opinion it should not. That the validity of a contract must be ascertained in relation to the laws of the country where it is made, is a rule as well known, and of as frequent application in this court, as any other we act under. We see nothing in the circumstance of the rights of one of the parties being transferred to the citizen of another State which can take the case out of the general principle. The argument which attempts to do so takes for granted the note was negotiable, in our understanding of the term, though the very object of the statute was to take from it that character. This is not the case of a citizen of one State claiming rights in opposition to those set up by a third party, under a contract made in pursuance to the laws of another country. It is a demand made under an agreement entered into in a foreign State, and consequently the party claiming rights under it must take it with all the limitations to which it was subject in the place where it was made, and that although he be one of our citizens.²

¹ Part of the opinion is omitted. — ED.

² All questions as to the validity and the nature of a mercantile obligation are to be determined by the law of the place where the obligation came into being. Thus

LEBEL v. TUCKER.

QUEEN'S BENCH. 1867.

[*Reported Law Reports, 3 Queen's Bench, 77*].

LUSH, J.¹ The action is on a bill drawn, accepted, and payable in England, and which is therefore an inland bill; and the action is brought by persons claiming the right to sue by title derived from the drawers and payees according to the English law. The defence is, that the indorsement was made in France, and is not conformable to the law of France, which requires that the indorsement should bear a date, and express the consideration for the indorsement and the name of the indorsee. The question is, is that any answer to an action against the acceptor of an English bill? The circumstances are somewhat novel, but the principle applicable is not novel; it existed before, and is well established by the decision in *Trimby v. Vignier*, 1 Bing.

capacity is governed by the law of the place of entering into the obligation. *Benton v. Bank*, 45 Neb. 850, 64 N. W. 227; 14 Clunet, 638 (Germany, 16 Oct. '85). See, however, 4 Clunet, 71 (Austria, 23 Dec. '75), domicile of the party to be bound; 26 Clunet, 177 (Austria, 27 April, '98), capacity of acceptor by place of drawing.

Whether sufficient consideration has passed is to be governed by the law of the place of obligation: as against the drawer, by the place of drawing: *Wood v. Gibbs*, 35 Miss. 559; as against the acceptor, by the place of acceptance: *Webster v. Howe Machine Co.*, 54 Conn. 394, 8 Atl. 482; *Pasic. Belge*, '93, 2, 39 (Liège, 16 July, '92); as against the indorser, by the place of indorsement: *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103; *Staples v. Nott*, 129 N. Y. 403.

The form of the obligation is governed by the law of the place of making; as whether commercial paper must be expressed as for "value received." *Stix v. Matthews*, 63 Mo. 371; *Sirey*, '57, 1, 586 (Fr. Cass. 18 Aug. '56). But see *Emanuel v. White*, 34 Miss. 56 (by law of place of payment). So whether the addition of a clause giving attorneys' fees deprives a bill of its negotiable character depends on the law of the place of making. *Howenstein v. Barnes*, 5 Dill. 482.

The nature of the liability created is governed by the law of the place of creating the obligation. Thus whether an "anomalous indorser" is a joint maker is determined by the law of the place of indorsement. *Phipps v. Harding*, 70 Fed. 468. Whether an indorser is liable personally to the indorsee is determined by the law of the place of indorsement. *Hyatt v. Bank*, 8 Bush, 193; *Nichols v. Porter*, 2 W. Va. 13; 16 Clunet, 735 (Cass. Florence, 16 Jan. '88). Whether an acceptor is liable to the drawer is determined by the law of the place of acceptance, 24 Clunet, 387 (Colmar, 11 Jan. '95). Whether a note is negotiable, so that payment to the payee or his creditor before notice of indorsement would not discharge the maker, is determined by the law of the place of making. *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775; *Warren v. Copelin*, 4 Met. 594; *Dow v. Rowell*, 12 N. H. 49. It has, however, been intimated that this question is governed by the law of the place of payment. *Brabston v. Gibson*, 9 How. 263 (*semble*); *Strawberry Point Bk. v. Lee*, 117 Mich. 122, 75 N. W. 444 (*semble*). And see *Savings Bank v. Nat. Bank*, 38 Fed. 800; *Bank v. Hemingray*, 31 Oh. S. 168.

It has been held that whether an indorsement for a pre-existing debt bars equities, as a purchase for value, is to be determined by the law of the place of indorsement. *King v. Doolittle*, 1 Head 77. — Ed.

¹ The concurring opinion of MELLOR, J., is omitted. — Ed.

N. C. 151, viz., that contracts must be governed by the law of the country where they are made. Now, the contract on which the present defendant, the acceptor, is sued, was made in England. The contract which the drawer proposes is this: he says, "Pay a certain sum at a certain date to my order;" the acceptor makes this contract his own by putting his name as acceptor, and his contract, if expanded in words, is, "I undertake at the maturity of the bill to pay to the person who shall be the holder under an indorsement from you, the payee, made according to the law merchant." How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England? The bill retains its original character; it remains an inland bill up to the time of its maturity, and is negotiable according to English law; and by the English law a simple indorsement in blank transfers the right to sue to the holder. This principle is pointedly applied by the judgment in *Trimbey v. Vignier*, 1 Bing. N. C. 151. My Brother *Hayes* is mistaken in supposing that the judgment deals *simpliciter* with the place of the indorsement, without reference to the fact of the instrument itself being a French note; on the contrary, that fact lies at the very bottom of the decision. Thus, at the very commencement of the judgment *TINDAL*, C. J., after saying that the point reserved was, whether the plaintiff, under the circumstances stated in the case, was entitled to maintain the action in an English court of law in his own name, proceeds: "The promissory note was made by the defendant in France; and it was indorsed in blank by the payee in that country; each of the parties, the maker and the payee, being at the respective times of making and indorsing the note domiciled in that country. The first inquiry, therefore, is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France." He then discusses what is the law of France, and comes to the conclusion that the plaintiff, the indorsee, could not have sued the maker in his own name in the courts of France, and proceeds: "The question, therefore, becomes this: Supposing such rule to prevail in the French courts, by the law of that country, is the same rule to be adopted by the English courts of law, when the action is brought here, the law of England, applicable to the case of a note indorsed in blank in England, allowing the action to be brought in the name of the holder? The rule which applies to the case of contracts, made in one country and put in suit in the courts of law of another country, appears to be this: that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractus*), the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought." He then cites authorities for this position, and concludes: "The question, therefore, is, whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only

relates to the mode of instituting and conducting the suit. . . . And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. . . . If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. . . . We think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here." The judgment, therefore, proceeds on the ground that the contract, that is, the contract of the maker of the note, having been made in France, it must be governed by the law of France. So here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes. Therefore, as it seems clear to me, the plaintiffs are entitled to judgment. It is not necessary to consider what would be the effect of this indorsement as against the indorser, if sued in France; probably, the courts of France would hold that the English law governed. All we decide is, that the acceptor having contracted in England to pay in England, the contract must be interpreted and governed by the law of England, and that the plaintiffs have acquired a right to sue.

*Judgment for the plaintiffs.*¹

ALCOCK v. SMITH.

COURT OF APPEAL. 1892.

[Reported [1892] 1 Chancery, 238.]

LINDLEY, L. J.² The question in this case is which of two persons is entitled to a sum of £350, being the produce of a certain cheque for £235 and a bill of exchange for £115. It will not be necessary to draw any distinction between the cheque and the bill, and, therefore, I will allude only to the bill.

¹ See *Bradlaugh v. De Rin*, L. R. 5 C. P. 473.

The sufficiency of an indorsement to pass title to a mercantile instrument is to be determined by the law of the place of indorsement. *Brook v. Vannest*, 58 N. J. L. 162, 33 Atl. 382; *Woods v. Ridley*, 11 Humph. 194; 5 Clunet, 51 (Palermo, 7 July, '77); 12 Clunet, 79 (Paris, 8 Dec. '81); 21 Clunet, 586; (Liège, 26 July, '93). *Contra* (by the law of the place of payment), *Everett v. Vendryes*, 19 N. Y. 436; 20 Clunet, 194 (Germ. 5 Nov. '89). — Ed.

² Concurring opinions of LOPES and KAY, L.JJ., are omitted. — Ed.

The bill was drawn in the English language in England by an Englishman named Ellison on Messrs. Smith, Payne, & Smith, of London, bankers, and was made payable in London. It was drawn to the order of Messrs. Andresen & Co., who were merchants in Christiania, in Norway. The history of the bill is this: It was indorsed by Messrs. Andresen to a Mr. Meyer, and it was on the 11th of March indorsed by Mr. Meyer in blank, and was given by him to a gentleman of the name of Schiender for Arthur Alcock and the firm of J. F. Alcock & Co., which last firm consisted of John Forster Alcock and Arthur Alcock. It is important to bear in mind that it was a bill which, as it then stood with Meyer's indorsement upon it, was a negotiable instrument transferable to bearer. The Alcocks then held it by their agent Schiender. In that state of things, under a judgment obtained in Norway against Mr. John Forster Alcock, one of the judicial officers or ministerial officers in Norway (a person whom I will allude to for the sake of shortness as a sheriff) seized in execution, according to the law of Norway, this bill indorsed as it was, and sold it in accordance with the law of Norway. It was bought by a person of the name of Schjödtt for Meyer, and, on the 9th of May, Meyer sold it to Köpmansbank. It did not require any further indorsement, because it was sold as a negotiable instrument payable to bearer, and was bought by Köpmansbank as a negotiable instrument payable to bearer; and they bought it in the ordinary course of business *bonâ fide* and for value. At that time the bill was unquestionably overdue. One point which we have to consider is, what was the effect of the purchase by Köpmansbank of this bill in its then state and under the circumstances I have mentioned, bearing in mind that it was an overdue bill of exchange? Now, according to Mr. Schiender's evidence, which is not contradicted or disputed, it is plain that, under the law of Norway, the judicial sale of that negotiable instrument "transferable to bearer" (a circumstance to which I attach great importance) conferred a good title upon the purchaser. It is also proved by the other evidence that, according to the law of Norway, a person who *bonâ fide* purchases for value a bill of exchange, which bill is overdue, is not affected in regard to title as he would be affected by the law of England.

That being the state of things, and Köpmansbank having become the holders of that bill for value, I proceed to consider whether they are or are not entitled to recover and hold for themselves the money represented by the bill. It has been argued by Mr. Haldane and Mr. Farwell, that inasmuch as this was an inland bill transferred to them when it was overdue, although it was taken *bonâ fide*, they took it subject to all equities affecting the bill, and they say that Köpmansbank could not maintain an action in respect of that bill against the acceptor of it. That argument is based upon the fact that this was an English bill, and upon the combined operation of the Bills of Exchange Act, sect. 72, sub-sect. 2, which I will read presently, sect. 36, sub-sect. 2, and sect. 29, sub-sect. 2. Now, it is impossible in applying those sec-

tions to this bill and to the title of Köpmansbank to ignore the fact that they acquired their title under the judicial sale, and if due effect is given to that, then it seems to me that, even looking at the matter in the narrowest possible point of view, Köpmansbank are entitled to recover this money from the acceptor.

Now, I will go through the sections with reference to the arguments which have been addressed to us. Sect. 72 of the Bills of Exchange Act relates to the conflict of laws, and the first part of it does not apply, but sub-sect. 2 runs thus: "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill" — as this is — "is indorsed in a foreign country" — as this was — "the indorsement shall as regards the payer" — which I read as the acceptor — "be interpreted according to the law of the United Kingdom." Now, this bill was indorsed in such a way, as it appears to me, that the indorsement was effectual whether you interpret according to English law or according to any other law. Then sect. 36, sub-sect. 2, is important, because, treating this as an English bill covered by English law, it is applicable. Sub-sect. 2 says this: "Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had." That is to say, if you take an overdue bill you take it subject to any defect of title in the person from whom you got it. That gives rise to the question, Was there any defect in title in Meyer, from whom Köpmansbank got it? That must be considered. But Meyer got it under the judicial sale, and there was no defect at all. Now, "defect of title" is a phrase introduced into the Bills of Exchange Act in lieu of the old expression "subject to equities," which is an expression not adopted because the Act applies to Scotland as well as to England, and "subject to equities" is an expression not known to Scotch law. Sect. 29, sub-sect. 2, says "In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." The present case clearly does not come within those words. The only possible words under which it could come would be "or other unlawful means." But the means by which Meyer got the bill were not unlawful; they were lawful according to the law of the place where the transaction took place. Therefore, putting the case in the light most favorable to the appellants, Köpmansbank have a good title to this bill and the money represented by it, treating it as an English bill and applying the provisions of the Bills of Exchange Act, having regard, of course, to what took place in Norway.

Now, if that is so, we have only further to consider whether there are any equitable grounds for depriving those gentlemen of the money to which they have become entitled. The appellants put their case very forcibly in this way, that the judicial sale of the bill was subject to the claim of Arthur Alcock to eight-elevenths of this money; but how can that equity attach to a bill indorsed in blank, and so transferable to bearer? That may be a question between themselves, but it does not affect any person taking the bill. The bill is taken simply with notice that the sheriff, as I have called him, was selling. Now, what did the sheriff sell? He did not sell the bit of paper merely, but he sold the bill — that is to say, he sold the benefit of the contract represented by the paper which he handed over. What was that benefit, and what was the contract? The contract on the part of the acceptor was to pay the bill to the lawful holder. That is said to mean, the lawful holder according to the law of England. I agree. But we must not ignore what took place in Norway. The argument on the part of the appellants is that we ought to shut our eyes to the mode and circumstances under which Meyer got the bill. If the mode and circumstances under which he got it were such as to give him a title in Norway, not only to the bill but to the benefit of the contract, then Köpmansbank are the lawful holders by the law of England, and there would be no defence to an action. The equity is displaced by the very same reasoning. You cannot enforce the equity as against the *bonâ fide* holder of a bill which is transferable to bearer, and of which he is the lawful holder.

With reference to the authorities, I do not think I need say much. The strength of the plaintiffs' case is that this was an overdue bill with notice of the defect in title. The answer is that there is no defect of title, and therefore there is nothing for the holders to have notice of. The cases of *Lebel v. Tucker*, Law. Rep. 3 Q. B. 77; *Lee v. Abdy*, 17 Q. B. D. 309; and *Bradlaugh v. De Rin*, Law Rep. 3 C. P. 538; *Ibid.* 5 C. P. 473, do not appear to me to touch this case at all. We are asked to say on the authority of those cases that the court is to ignore a title which is good according to the law of the country where the bill has been sold. Those cases lay down no such principle. The difficulty of the appellants in this case arises from the fact that Alcocks, though they had been the lawful holders of the bill, had ceased to be so by the law of Norway. *Lebel v. Tucker*, Law. Rep. 3 Q. B. 77, does not touch that, nor do any of the cases which have been referred to come near it.

On those short grounds, treating this to the fullest extent as a bill overdue when bought, and assuming that Köpmansbank are supposed to have had notice of any defect of title, the fact that there was no defect of title is a complete answer both at law and in equity. Therefore, I am of opinion that the learned judge in the court below in this case was quite right, and that this appeal must be dismissed with costs.

AYMAR v. SHELDON.

SUPREME COURT, NEW YORK. 1834.

[Reported 12 Wendell, 439.]

ERROR from the Superior Court of the city of New York. Sheldon and others, as indorsees, brought a suit against B. & I. Q. Aymar, as indorsers of a bill of exchange, bearing date 4th June, 1830, drawn by V. Cassaigne & Co. St. Pierre, at Martinique, on L'Hôtelier Frères, at Bordeaux, in France, for 4,000 francs, payable at twenty-four days' sight, to the order of B. Aymar & Co., the name of the firm of B. & I. Q. Aymar. The plaintiffs set forth the indorsement of the bill of exchange at the city of New York, where, they averred, that they and the defendants, all being citizens of the United States at the time of the indorsement, respectively dwelt and had their homes; and then aver that on the 11th August, 1830, the bill of exchange was presented to L'Hôtelier Frères, at Bordeaux, for acceptance, according to the custom of merchants, and that they refused to accept; whereupon the bill was duly protested for non-acceptance, and notice given to the defendants. The defendant pleaded: 1. Non-assumpsit; 2. That the bill declared on was made and drawn in the island of Martinique, a country then, since, and now, under the dominion and government of the king of France, by persons there dwelling subjects of the king of France; and that the bill, according to its tenor, was payable at Paris, in the kingdom of France, by persons then and still residing and dwelling at Bordeaux, in the kingdom of France, subjects of the king of France, to wit, on, etc. at, etc.; that the island of Martinique, as well as Paris and Bordeaux, and the persons therein respectively residing, and the drawers and drawees were subject and governed by the laws of the kingdom of France, there and then, and still existing and in force, to wit on, etc. at, etc.; that by the laws of France, then and still at the several places in the plea mentioned, existing and in force, it is established, enacted, and provided, in relation to bills of exchange drawn and payable in the countries subject to the laws of France, among other things, in manner and form following, namely: The drawer and indorsers of a bill of exchange are severally liable for its acceptance and payment at the time it falls due. Code de Commerce, 119. The refusal of acceptance is evidenced by an act denominated protest for non-acceptance, *id.* 120. On notice of the protest for non-acceptance, the indorsers and drawer are respectively bound to give security, to secure the payment of the bill at the time it falls due, or to effect reimbursement of it, with the expense of protest and re-exchange. The time when a bill of exchange becomes due, if payable at one or more days after sight, is fixed by the date of the acceptance, or by the date of the protest for non-acceptance. The holder is not

excused the protest for non-payment by the protest for non-acceptance. After the expiration of the above periods (certain periods specified in the code, and which, in the case of a bill drawn in the West Indies on France, is one year) for the presentment of bills at sight, or one or more days after sight, for protest of non-payment, the holder of the bill loses all his claim against the indorsers, etc. setting forth, besides the above, a variety of other provisions of the French code, relative to bills of exchange, and then averring, that although at the time of the commencement of the action of the plaintiffs, twenty-four days after sight of the bill of exchange declared on had elapsed, from the day when the same was alleged to have been protested for non-acceptance, yet no protest of the said bill for non-payment had been made, concluding with a verification and prayer of judgment. 3. The defendants pleaded, after referring to the matter of inducement stated in the second plea, that on notice of protest for non-acceptance, as alleged in the declaration, they were ready and willing to give security; and offered to the plaintiffs to give security, according to the true intent and meaning of the laws of France, to secure payment of the bill at the time when the same should fall due, to wit, on, etc. at, etc., concluding as in last plea. To the second plea the plaintiffs demurred, and took issue upon the third, denying that the defendants did offer security, etc.

The Superior Court, on the argument of the demurrer, adjudged the second plea to be bad; after which the issues of fact were tried. The jury found for the plaintiffs, on the plea of non-assumpsit, and assessed their damages at \$895.52, and found a verdict for the defendants on the third plea. Notwithstanding which last finding, the court gave judgment for the plaintiffs on the whole record. The defendants sued out a writ of error.

By the court, NELSON, J. The only material question arising in this case is, whether the steps necessary on the part of the holders of the bill of exchange in question, to subject the indorsers upon default of the drawees to accept, must be determined by the French law, or the law of this State? If by our law, the plaintiffs below are entitled to retain the judgment; if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed.

We have not been referred to any case, nor have any been found in our researches, in which the point now presented has been examined or adjudged. But there are some familiar principles belonging to the law merchant, or applicable to bills of exchange and promissory notes, which we think are decisive of it. The persons in whose favor the bill was drawn were bound to present it for acceptance and for payment, according to the law of France, as it was drawn and payable in French territories; and if the rules of law governing them were applicable to the indorsers and indorsees in this case, the recovery below could not be sustained, because presentment for payment would have been essential even after protest for non-acceptance. No principle, however, seems more fully settled, or better understood in commercial law, than

that the contract of the indorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by indorsement is equivalent in effect to the drawing of a bill, the indorser being in almost every respect considered as a new drawer. Chitty on Bills, 142; 3 East, 482; 2 Burr. 674, 5; 1 Str. 441; Selw. N. P. 256. On this ground, the rate of damages in an action against the indorser is governed by the law of the place where the indorsement is made, being regulated by the *lex loci contractus*. 6 Cranch, 21; 2 Kent's Com. 460; 4 Johns. R. 119. That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, has been adjudged both here and in England. In Hix v. Brown, 12 Johns. R. 142, the bill was drawn by the defendant, at New Orleans, in favor of the plaintiff, upon a house in Philadelphia; it was protested for non-acceptance, and due notice given; the defendant obtained a discharge under the insolvent laws of New Orleans after such notice, by which he was exonerated from all debts previously contracted, and, in that State, of course from the bill in question. He pleaded his discharge here, and the court say, "It seems to be well settled, both in our own and in the English courts, that the discharge is to operate according to the *lex loci* upon the contract where it was made or to be executed. The contract in this case originated in New Orleans, and had it not been for the circumstance of the bill being drawn upon a person in another State, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as drawer of the bill, in consequence of the non-acceptance. The whole contract or responsibility of the drawer was entered into and incurred in New Orleans. The case of Peters v. Brown, 5 East, 124, contains a similar principle. See also 3 Mass. R. 81; Van Raugh v. Van Arsdaln, 3 Caines, 154; 1 Cowen, 107; 6 Cranch, 221; 4 Cowen, 512, n.

The contract of indorsement was made in this case, and the execution of it contemplated by the parties in this State; and it is therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn, are equally applicable to the indorser; for, in respect to the holder, he is a drawer. Adopting this rule and construction, it follows that the law of New York must settle the liability of the defendants below. The bill in this case is payable twenty-four days after sight, and must be presented for acceptance; and it is well settled by our law, that the holder may have immediate recourse against the indorser for the default of the drawee in this respect. 3 Johns. R. 202; Chitty on Bills, 231, and cases there cited.

Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is therefore to be presumed that the parties had reference to it. So the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition. Chitty on Bills, 266, 93, 217; Bayley, 28; Story's Conflict of Laws, 298.

The contract of the drawers in this case, according to the French law, was, that if the holder would present the bill for acceptance within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested and notice given of the protest, he would give security to pay it, and pay the same if default was also made in the payment by the drawee after protest and notice. This is the contract of the drawers, according to this law, and the counsel for the plaintiffs in error insists that it is also the implied contract of the indorser in this State. But this cannot be, unless the indorsement is deemed an adoption of the original contract of the drawers, to be regulated by the law governing the drawers, without regard to the place where the indorsement is made. We have seen that this is not so; that notice must be given according to the law of the place of indorsement; and if, according to it, notice of non-payment is not required, none of course is necessary to charge the indorser. But if the above position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the drawer controlling. The above position of the counsel would also be irreconcilable with the principle, that the indorsement is equivalent to a new bill, drawn upon the same drawee; for then the rights and liabilities of the indorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country in which they were at the time of entering into their respective obligations.

I am aware that this conclusion may operate harshly upon the indorsers in this case, as they may not be enabled to have recourse over on the drawers. But this grows out of the peculiarity of the commercial code which France has seen fit to adopt for herself, materially differing from that known to the law merchant. We cannot break in upon the settled principles of our commercial law, to accommodate them to those of France or any other country. It would involve them in great confusion. The indorser, however, can always protect himself by special indorsement, requiring the holder to take the steps

necessary according to the French law, to charge the drawer. It is the business of the holder, without such an indorsement, only to take such measures as are necessary to charge those to whom he intends to look for payment.

*Judgment affirmed.*¹

ROUQUETTE v. OVERMANN.

QUEEN'S BENCH. 1875.

[*Reported Law Reports, 10 Queen's Bench, 525.*]

THIS was an action brought by the plaintiff as indorsee and holder against the defendants as drawers and indorsers of a bill of exchange. The bill is as follows :

"Manchester, 28th June, 1870. For £345 15s. 2d. sterling. On the 5th of October, 1870, pay this first of exchange (second and third unpaid) to the order of ourselves the sum of £345 15s. 2d. sterling, at the exchange as per indorsement for value received, which place to account as advised.

OVERMANN & SCHOU.

"To Messrs. Magalhaes Frères, 5 Rue Martel, Paris."

Defendants indorsed the bill to plaintiff in England. The bill was duly presented to the drawees in Paris and accepted by them. Before the time for payment, war having broken out between France and Germany, payment of this and similar instruments was postponed from time to time by the legislative authority in France, and demand of payment before the time fixed forbidden, until a delay of eleven months was finally provided. On the 5th of September, the day on which the extended term of grace expired, the bill was presented for

¹ It is held generally in this country that the nature of the notice required to bind a drawer or indorser to a holder depends upon the law of the place of drawing or indorsement. *Thorp v. Craig*, 10 Ia. 461; *Huse v. Hamblin*, 29 Ia. 501; *Snow v. Perkins*, 2 Mich. 238; *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874; *Raymond v. Holmes*, 11 Tex. 54. *Contra* (by the law of the place of payment of the instrument), *Rothschild v. Currie*, 1 Q. B. 43; *Wooley v. Lyon*, 117 Ill. 244, 6 N. E. 885; *Chew v. Read*, 11 Sm. & M. 182; 3 Clunet, 361 (Paris, 22 March, '75).

So, it has been held, that whether a provision of the bill has the effect of a waiver of notice by the indorsee is determined by the law of the place of making and indorsement. *Dunnigan v. Stevens*, 122 Ill. 396, 13 N. E. 51.

Whether prior judgment against the maker is required before suing the indorser is likewise governed by the law of the place of indorsement. *Williams v. Wade*, 1 Met. 82 (*semble*). And what diligence is necessary to bind drawer or indorser is governed by the law of the place of drawing or indorsement. *Hunt v. Standart*, 15 Ind. 33; *Warner v. Citizens' Bank*, 6 S. D. 152, 60 N. W. 746; *Sirey*, '96, 4, 7 (Cass. Florence, 8 Apr. '95). *Contra* (by law of place of payment), 15 Clunet, 554 (Palermo, 13 Dec. '86).

The form of protest is regulated by the law of the place of protest, *i. e.*, of payment. *Todd v. Neal*, 49 Ala. 266; *Kentucky Com. Bk. v. Barksdale*, 36 Mo. 563; 21 Clunet, 370 (Brussels, 14 June, '93). — Ed.

payment, which was refused. The bill was duly protested, according to the French law, on the 6th of September, and notice of dishonor and of the protest duly sent to the defendants. The defendants refused payment.¹

COCKBURN, C. J. The main ground of defence is that due diligence was not used by the holders of the bill in presenting it for payment at the appointed time, or in giving notice of dishonor on its non-payment at that time; by reason of which the indorsers were discharged; whence, as was contended, it followed that the plaintiff had paid the bill in his own wrong, and therefore could not claim to be indemnified by the defendants; who, again, it was said, were entitled on their own account to notice of dishonor on non-payment at the regular time, — it being contended that whatever might be the effect of this special legislation of the French government, as between the holders of the bill and the acceptors, the holders, though resident in France, were bound, the bill having been drawn and indorsed in England, if they desired to fix the parties in this country, to present the bill for payment at the time at which it fell due in the regular course, according to its tenor, and if it was not then paid, to give notice of its dishonor — the right to insist on due diligence in these particulars according to the law of England, as a condition precedent of liability, being one which it was not competent to a foreign legislature to affect. That, at all events, the transaction between the defendants and the plaintiff having occurred in this country, their respective rights and liabilities must be determined by English law. The implied contract of indemnity, which attaches on non-payment of a bill of exchange, is based, it was urged, on the assumption that the bill will be presented for payment at the time specified by it; and that, in case of non-payment, notice of dishonor will thereupon be given. How then, it was asked, can the right to insist on these as the conditions of liability on a bill drawn and indorsed in this country be modified or affected by the legislation of a foreign country?

The question is of considerable importance and interest in a juridical point of view. It has occupied the attention of the tribunals in Germany, Switzerland, and Italy. The High Court of Leipzig has decided it in favor of the view presented to us on the part of the defendants. The High Court of Geneva and the Cour de Cassation of Turin have come to the opposite conclusion. Our view coincides with theirs.

In considering the subject, two questions present themselves. The first, as to what was the effect of this special legislation on the obligations of the acceptors; the second, as to what, if any, was its effect on the rights and liabilities of the drawers and indorsees *inter se*. It is with the second question that we are more immediately concerned; but the consideration of the first may materially assist us towards the satisfactory solution of the second.

¹ This statement of facts is substituted for that of the Chief Justice. Part of the opinion is omitted. — Ed.

Now that, so far as the French law was concerned, the effect of the exceptional legislation in question was to substitute, as the time of payment, the expiration of the period of grace afforded by it for the time specified in the bill, and to suspend till then the legal obligation of the acceptors to pay, cannot be doubted. If the bill had been presented for payment on the 5th of October, and payment having been refused, an action had been brought in a French court against the acceptors, whether by a French or foreign holder, the plaintiff must by the effect of the new law have been defeated. Even if the acceptors had been found in this country, and an action had been brought against them in an English court, the result must have been the same. It is well settled that the incidents of presentment and payment must be regulated and determined by the law of the place of performance, — a rule which is strikingly illustrated by the familiar but pertinent example of the effect of days of grace being allowed by the law of the country where a bill of exchange is drawn, but not by the law of the country where it is payable, or *vice versa*, the payment of the bill being, as is well known, deferred till the expiration of the days of grace in the one case, but not so in the other. And this arises out of the nature of the thing, as the acceptor cannot be made liable under any law but his own. It is, indeed, true that, in the present instance, the period of grace has been accorded by *ex post facto* legislation. But this appears to us to make no difference in the result, at all events so far as the obligations of the acceptors are concerned. The power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.

Such being the effect of this legislation on the liability of the acceptor, we have next to consider its effect on the relative position of the drawer and the drawee or indorsee and holder. It is said that, although the obligations of the acceptor may be determined by the *lex loci* of the country in which the bill is payable, the contract as between the drawer and indorsee must be construed according to the law of the country where the bill was drawn; and, consequently, that in order to make the defendants, the drawers of this bill, liable, the bill should have been presented at the time specified in it, and on non-payment notice of dishonor should thereupon have been given according to the requirements of English law. It is unnecessary to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract, so far as presentment for payment is concerned; still less to a formality required on non-payment in order to enable the holder to have recourse to an antecedent party to the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract which a party transferring for value the property in a bill of exchange

makes with the transferee. All that he does is to warrant that the bill shall be accepted by the drawee, and, having been accepted, shall, on being presented at the time it becomes due, be paid. In other words, he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance. His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be those of the surety. To hold otherwise would obviously lead to very startling anomalies. The holder might sue the drawer or indorser before, according to the law applicable to the acceptor, the bill became due; or, the acceptor having refused payment till the expiration of the period of grace thus afforded him by the new law, but on presentment at the end of that time having duly paid, the holder might claim compensation against the indorser in respect of any loss he might have sustained by reason of the delay, although the obligations of the acceptor had been fully satisfied by the payment of the bill. Again, as a bill may be indorsed in different countries before it arrives at maturity, and each indorsement becomes a fresh undertaking with the subsequent parties to the bill for due performance by the acceptor, unless the performance to which the acceptor is bound is made the measure and the limit of each indorser's liability, confusion must arise in determining by what law the rights and liabilities of the different indorsers and indorseees *inter se* shall be governed.

It may be urged, no doubt, that, though it may be true that the parties to a bill of exchange, payable in a foreign country, may be assumed to have contracted for the payment of the bill according to the existing law of the country in which it is to be paid, they cannot be assumed to have contracted on the supposition of that law being altered in the interval prior to the bill becoming due; that, on the contrary, the intention of the parties was that the bill should be paid according to the existing law, and the undertaking of the party transferring it was that it should be so paid; and that such being the effect of the indorsement, the obligation of the indorser cannot, as between him and his indorsee, be affected by *ex post facto* legislation in the foreign country. A strong argument *ab inconvenienti* may also be founded on the serious consequences which may ensue to the holder of a bill of exchange, if the time of payment, as fixed by the bill, may be postponed by subsequent legislation. He may require the money secured by the bill at the precise moment it is to become due: he may have purchased the bill for the purpose of insuring the command of it. The delay in receiving it may involve him in the greatest embarrassment. The indorser ought, therefore, to be held strictly to his undertaking that the bill shall be met at the time stated in it, and contemplated by the parties as the date of payment. That to hold otherwise would be materially to shake the credit and impair the utility of negotiable instruments.

To the first of these arguments it may be answered, that the indorser of a bill guarantees its payment only according to the effect of the bill at the place of payment. He transfers all the right the acceptance gives him against the acceptor, and guarantees that the obligations of the latter, as arising from the acceptance, shall be fulfilled. If, by an alteration of the local law pending the currency of the bill, the obligations of the acceptor are rendered more onerous, those of the indorser become so likewise. Thus, if it were enacted that certain days should be treated as holidays, and that a bill falling due on any one of them should be paid at an earlier date, the indorser, on non-payment of the bill at such earlier date, would become liable from such date. On the other hand, if the time of payment were postponed by a period of grace being allowed, or by an enactment that a bill, falling due on a day appointed to be kept as a holiday, should be payable a day after, — as was done by the Act of 34 & 35 Vict. c. 17, — the period at which the liability of the indorser on non-payment by the acceptor would arise, would be *pro tanto* delayed.

To the second argument it may be answered, that it goes rather to the expediency of such exceptional legislation than to its effect. Further, that the instances in which it is resorted to are so extremely rare as to be little likely to have the effect of lessening the faith in negotiable instruments or diminishing their utility.

If, then, the right of the holder, as against the acceptor and the antecedent parties, can be thus modified in respect of the time of payment, there can be no injustice or hardship towards them in holding him exempted from the obligations of presenting the bill earlier than his right of payment accrues, or of giving notice of dishonor in order to preserve his right of recourse to them.

If the time of payment, which is of the essence of the contract, and the consequent necessity for presentment at the original time can thus be postponed, it would seem to follow that, *à fortiori*, a formality, the necessity for which arises only on the non-fulfilment of his obligation by the acceptor, would follow any alteration introduced by the law in respect of the time at which that obligation was to be discharged. But, independently of this consideration, we are of opinion, on general principles, that notice of dishonor cannot be required until payment has been legally demandable of the acceptor, and has been refused. It is true that if the bill had been presented for payment at the time mentioned in it, the acceptors might, possibly, have omitted to avail themselves of the indulgence accorded by the special law, and might have paid at once. But so might, possibly, the acceptor of a bill under ordinary circumstances, if asked to do so as matter of grace or of special arrangement. The holder of a bill of exchange cannot be held bound to present it for payment till it becomes legally payable, that is to say, payable as matter of right and not of option. Neither, therefore, can he be called upon to give notice of non-payment to the indorser before the time when his right to demand payment of the acceptor has

accrued, and the liability of the indorser, consequent on such refusal, has arisen. There cannot be two different times at which a bill of exchange becomes payable. Suppose the holder had presented this bill for payment at the time specified in it, and payment had been refused by reason of the extension of time afforded by the new law, such presentment would certainly not have dispensed with the necessity of presenting the bill anew, when the period of grace expired, and the liability of the acceptors had arisen; and the omission to present it then would have had the effect of discharging the indorser. If presentment at the expiration of the time allowed by the special law was necessary to fix the legal liability of the acceptor and the indorser, it was only on such presentment and non-payment thereupon that the bill could be treated as dishonored, or that notice of its dishonor could be effectually given so as to charge the indorser. Another ground for holding that presentment and notice of dishonor at the earlier period were not necessary to preserve the right of recourse against the defendants, as drawers and indorsers, is to be found in the reasons assigned for requiring presentment at the appointed time and notice of dishonor immediately on payment being refused. The reason given is, that the drawer, whom it is intended to make liable, may have the earliest opportunity of withdrawing his assets from the acceptor, or resorting to such other remedies against him as the law may afford. But in such a case as the present, as the acceptor remains bound to the holder to pay the bill when presented at the time it becomes legally due, the drawer could not withdraw from him the means of satisfying that liability, or take steps against him for non-fulfilment of an obligation not as yet capable of being legally enforced. . . .

On these grounds we are of opinion that the presentment for payment was made, and the notice of dishonor given, at the right time, and that the foundation on which the defence rests consequently fails.

Our judgment, therefore, must be for the plaintiff.

*Judgment for the plaintiff.*¹

¹ The time for presentment for payment is governed by the law of the place of payment. *Pierce v. Insdeth*, 106 U. S. 546; *Pryor v. Wright*, 14 Ark. 189; *Snow v. Perkins*, 2 Mich. 238 (*semble*); *Kentucky Com. Bk. v. Barksdale*, 36 Mo. 563; *Walsh v. Dart*, 12 Wis. 635; 1 Clunet, 100 (Austrian Consular Ct., 15 April, '72); 1 Clunet, 149 (Sweden, 14 May, '73); 1 Clunet, 209 (Brussels, 29 Apr. '72); 21 Clunet, 370 (Brussels, 14 June, '93); 24 Clunet, 827 (Germ. 11 Dec. '95). *Contra*, 1 Clunet, 185 (R. O. H. G. 21 Feb. '71). — Ed.

BOWEN v. NEWELL.

COURT OF APPEALS, NEW YORK. 1855.

[Reported 13 New York, 290.]

JOHNSON, J. By the law of the State of Connecticut, where this paper was to be paid, it was payable upon the day when, by its tenor, it became due, without grace. What the law of a foreign country is, can only be determined upon evidence; it is a question of fact. The Superior Court has decided upon evidence derived from the best sources, and of the most unquestionable character, that such is the law of Connecticut, and we see no ground to doubt the correctness of that conclusion. Nor is there any more room to doubt that by the law of this State, the law of Connecticut is to control and govern, in respect to the allowance of grace upon a bill of exchange or check drawn upon and payable at a Bank in that State. (Story, Conf. of Laws, 2d ed., § 361.)

The judgment should be affirmed.

Judgment accordingly.

SECTION IX. — (B) OBLIGATIONS OF CARRIERS.

LIVERPOOL & G. W. STEAM CO. v. PHENIX INS. CO.

SUPREME COURT OF THE UNITED STATES. 1889.

[Reported 129 United States, 397.]

GRAY, J. This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, "in a cause of action arising from breach of contract," brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the "Montana," one of the appellant's steamships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead Bay on the coast of Wales, before reaching her destination.

In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master and officer; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading; and that the libellant had not been subrogated to the rights of the owners of the goods. . . .

The circumstances of the case, as found by the Circuit Court, clearly warrant, if they do not require, a court or jury, charged with the duty of determining issues of fact, to find that the stranding was owing to the negligence of the officers of the ship. . . .

We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship.

The question appears to us to be substantially determined by the judgment of this court in *Railroad Co. v. Lockwood*, 17 Wall. 357. . . .

It was argued for the appellant, that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that State in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence. *Mynard v. Syracuse Railroad*, 71 N. Y. 180; *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71.

But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State. *Railroad Co. v. Lockwood*, 17 Wall. 357, 368; *Myrick v. Michigan Central Railroad*, 107 U. S. 102; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 511; *Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. National Bank*, 102 U. S. 14; *Burgess v. Seligman*, 107 U. S. 20, 33; *Smith v. Alabama*, 124 U. S. 365, 478; *Bucher v. Cheshire Railroad*, 125 U. S. 555, 583. The decisions of the State courts certainly cannot be allowed any greater weight in the Federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States.

It was also argued in behalf of the appellant, that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers.

First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts and opinions of commentators in France, Italy, Germany, and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country; and it has been said by many jurists that the law of France, at least, was otherwise. See 2 *Pardessus Droit Commercial*, no. 542; 4 *Goujet & Meyer Dict. Droit Commercial* (2d ed.) *Voiturier*, nos. 1, 81; 2 *Troplong Droit Civil*, nos. 894, 910, 942, and other books cited in *Peninsular & Oriental Co. v. Shand*, 3 Moore P. C. (N. S.) 272, 278, 285, 286; 25 *Laurent Droit Civil Français*, no. 532; *Mellish, L. J.*, in *Cohen v. Southeastern Railway*, 2 Ex. D. 253, 257.

Second. The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever been adopted in the United States or in England, or recognized in the admiralty courts of either. *The Lottawanna*, 21 Wall. 558; *The Scotland*, 105 U. S. 24, 29, 33; *The Belgenland*, 114 U. S. 355, 369; *The Harrisburg*, 119 U. S. 199; *The Hamburg*, 2 Moore P. C. (n. s.) 289, 319; s. c. Brown. & Lush. 253, 272; *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 123, 124; s. c. 6 B. & S. 100, 134, 136; *The Gaetano & Maria*, 7 P. D. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board of a British vessel and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid. . . .

It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the Railway and Canal Traffic Act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. *The Duero*, L. R. 2 Ad. & Ec. 393; *Taubman v. Pacific Co.*, 26 Law Times (n. s.) 704; *Steel v. State Line Steamship Co.*, 3 App. Cas. 72; *Manchester & c. Railway v. Brown*, 8 App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain.

The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case) as follows: "The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, when the parties (at the time of making the contract) had a view to a different kingdom." *Robinson v. Bland*, 1 W. Bl. 284, 256, 258; s. c. 2 Bur. 1077, 1078.

The recent decisions by eminent English judges, cited at the bar, so clearly affirm and so strikingly illustrate the rule, as applied to cases more or less resembling the case before us, that a full statement of them will not be inappropriate.

In *Peninsular & Oriental Co. v. Shand*, 3 Moore P. C. (n. s.) 272, 290, Lord Justice Turner, delivering judgment in the Privy Council, reversing a decision of the Supreme Court of Mauritius, said, "The

general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."

It was accordingly held, that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him hence by way of Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. 3 Moore P. C. (N. S.) 278.

Lord Justice Turner observed, that it was a satisfaction to find that the Court of Cassation in France had pronounced a judgment to the same effect, under precisely similar circumstances, in the case of a French officer taking passage at Hong Kong, an English possession, for Marseilles in France, under a like contract, on a ship of the same company, which was wrecked in the Red Sea, owing to the negligence of her master and crew. *Julien v. Peninsular & Oriental Co.*, imperfectly stated in 3 Moore P. C. (N. S.) 282, note, and fully reported in 75 Journal du Palais (1864), 225.

The case of *Lloyd v. Guibert*, 6 B. & S. 100; s. c. L. R. 1 Q. B. 115, decided in the Queen's Bench before, and in the Exchequer Chamber after, the decision in the Privy Council just referred to, presented this peculiar state of facts: A French ship owned by Frenchmen was chartered by the master, in pursuance of his general authority as such, in a Danish West India island, to a British subject, who knew her to be French, for a voyage from St. Marc in Hayti to Havre, London, or Liverpool at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage, the ship sustained damage from a storm which compelled her to put into a Portuguese port. There the master lawfully borrowed money on bottomry, and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English court of admiralty against the ship, freight and cargo, which being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship; and they abandoned the ship and freight in such a manner as by the French law absolved them from liability. It was held, that the French law governed the case, and therefore the plaintiff could not recover.

It thus appears that in that case the question of the intent of the

parties was complicated with that of the lawful authority of the master ; and the decision in the Queen's Bench was put wholly upon the ground that the extent of his authority to bind the ship, the freight or the owners, was limited by the law of the home port of the ship, of which her flag was sufficient notice. 6 B. & S. 100. That decision was in accordance with an earlier one of Mr. Justice Story, in *Pope v. Nickerson*, 3 Story, 465 ; as well as with later ones in the Privy Council, on appeal from the High Court of Admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. *The Karnak*, L. R. 2 P. C. 505, 512 ; *The Gætano & Maria*, 7 P. D. 137. See also *The Woodland*, 7 Bened. 110, 118, 14 Blatchf. 499, 503, and 104 U. S. 180.

The judgment in the Exchequer Chamber in *Lloyd v. Guibert* was put upon somewhat broader ground. Mr. Justice Willes, in delivering that judgment, said : " It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situated in another country, and so forth ; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made ; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract." L. R. 1 Q. B. 122, 123, 6 B. & S. 133.

It was accordingly held, conformably to the judgment in *Peninsular & Oriental Co. v. Shand*, above cited, that the law of England, as the law of the place of final performance or port of discharge, did not govern the case, because it was " manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby," although as to the mode of delivery the usages of Liverpool would govern. L. R. 1 Q. B. 125, 126 ; 6 B. & S. 137. It was then observed that the law of Portugal, in force where the bottomry bond was given, could not affect the case ; that the law of Hayti had not been mentioned or relied upon in argument ; and that " in favor of the law of Denmark, there is the cardinal fact that the contract was made in Danish territory, and further, that the first act done towards performance was weighing anchor in a Danish port ;" and it was finally, upon a view of all the circumstances of the case, decided that the law of France, to which the ship and her owners belonged, must govern the question at issue.

The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favor of the law of England, by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter party in the French language of a French ship, in a port where both were foreigners, to be performed partly there by weighing anchor for the port of loading (a place where both parties would also be foreigners), partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the question of the liability of the owner beyond the value of the ship and freight.¹ . .

This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

There does not appear to us to be anything in either of the bills of lading, in the present case, tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made.

The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped "in and upon the steamship called 'Montana,' now lying in the port of New York and bound for the port of Liverpool," and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St." No distinc-

¹ The learned Judge here examined the following cases: *Chartered Bank of India v. Netherlands S. N. Co.*, 9 Q. B. D. 118, 10 Q. B. D. 521; *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589; *Watts v. Camors*, 115 U. S. 353; *Pope v. Nickerson*, 3 Story, 465; *Morgan v. R. R.*, 2 Woods, 244; *Hale v. N. J. S. N. Co.*, 15 Conn. 538; *Dyke v. Erie Ry.*, 45 N. Y. 113; *McDaniel v. C. & N. W. Ry.*, 24 Ia. 412; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Brown v. C. & A. R. R.*, 83 Pa. 316; *Curtis v. D. & L. R. R.*, 74 N. Y. 116; *Barter v. Wheeler*, 49 N. H. 9; *Gray v. Jackson*, 51 N. H. 9. — Ed.

tion is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to tranship the goods by any other steamer," would permit transshipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York in England, and adopted in 1877 at Antwerp in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lowndes on General Average (3d ed.), Appendix Q.

The contract being made at New York, the shipowner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. *Peninsular & Oriental Co. v. Shand*, *Lloyd v. Guibert*, and *Chartered Bank of India v. Netherlands Steam Navigation Co.*, before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville and Nashville Railroad and its connections, and by the Williams and Guion Steamship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty-four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville and Nashville Railroad and its connections as common carriers "terminates on delivery of the goods or property to the steamship company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." And in the margin is this significant reference to a provision of the statutes of the United States, applicable to the ocean transportation only: "ATTENTION OF SHIPPERS IS CALLED TO THE ACT OF CONGRESS OF 1851: 'Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches [or] gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall

forfeit to the United States one thousand dollars.' " Act of March 3, 1851, c. 43, § 7; 9 Stat. 636; Rev. Stat. § 4288.

It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in *Peninsular & Oriental Co. v. Shand* gives some color to the argument. 3 Moore P. C. (N. S.) 291. But the facts of the two cases are quite different in this respect. In that case, effect was given to the law of England, where the contract was made; and both parties were English, and must be held to have known the law of their own country. In this case, the contract was made in this country, between parties one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that the shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.

This conclusion is in accordance with the decision of Judge Brown in the District Court of the United States for the Southern District of New York in the *Brantford City*, 29 Fed. Rep. 373, which appears to us to proceed upon more satisfactory grounds than the opposing decision of Mr. Justice Chitty, sitting alone in the Chancery Division, made since this case was argued, and, so far as we are informed, not reported in the Law Reports, nor affirmed or considered by any of the higher courts of Great Britain. *In re Missouri Steamship Co.*, 58 Law Times (N. S.) 377.

The present case does not require us to determine what effect the

courts of the United States should give to this contract, if it had expressly provided that any question arising under it should be governed by the law of England.¹

DIKE v. ERIE RAILWAY.

COURT OF APPEALS, NEW YORK. 1871.

[Reported 45 *New York*, 113.]

APPEALS from the General Term of the Supreme Court in the Second District in Dike's case, and from the General Term of the Supreme Court in the Sixth District in Floyd's case.

These actions were to recover damages for personal injuries sustained by the plaintiffs while passing over the road of the defendant as passengers, caused by the negligence of the defendant's servants and agents. The defendant is a corporation existing under the laws of the State of New York, owning and operating a railroad for the carriage of freight and passengers between the cities of Buffalo and New York, in that State, and the intermediate places, running its road, *en route* between the termini named, for short distances in the States of Pennsylvania and New Jersey by the permission of those States respectively.

Each of the plaintiffs purchased a ticket and took passage on the defendant's road, on the 14th of April, 1868, from stations in this State to the city of New York, and while in transit from the place of departure to the city of New York, and upon a part of the road in the State of Pennsylvania, sustained the injuries complained of. By an act of the legislature of Pennsylvania, passed April 4, 1868, the recovery in actions then or thereafter instituted against common carriers or railroad corporations for personal injuries is limited to \$3,000. Upon the trials, it was claimed in behalf of the defendant that the rights of recovery of the plaintiffs were controlled by this act. The claim was overruled by the judge, and each of the plaintiffs had verdicts in excess of the limit prescribed by the Pennsylvania statute, Dike for \$35,000, at the King's Circuit, and Floyd for \$15,000 at the Tioga Circuit, and judgments upon such verdicts were affirmed by the

¹ *Acc. Hale v. N. J. S. N. Co.*, 15 Conn. 539; *Pennsylvania Co. v. Fairchild*, 69 Ill. 261; *Brockway v. American Ex. Co.*, 171 Mass. 158, 50 N. E. 626; *Davis v. C. M. & S. P. Ry.*, 93 Wis. 470, 67 N. W. 16; 8 Clunet, 72 (Cass. Belg. 30 Jan. '79); 26 Clunet, 420 (Holland, 17 May '97).

The English cases hold the charter-party or bill of lading to be regulated by the law of the flag. *Peninsular & O. S. N. Co. v. Shand*, 3 Moo. P. C. n. s. 272; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *The August*, [1891] P. 328. If, however, the facts clearly indicate an intention to be bound by another law, the instrument is governed by such law. *The Industrie*, [1894] P. 58. — ED.

Supreme Court at the General Terms. The defendant has appealed to his court.¹

ALLEN, J. The only question to be considered upon this appeal is as to the effect of the Pennsylvania statute, limiting the amount of the recovery in actions of this character. It is conceded that the statutes of one State are not obligatory upon the courts of other States; that they have not *proprio vigore*, the force of law beyond the limits of the State enacting them. But it is sought to bring these actions within the operation and effect of the foreign statute upon the ground that the contracts were made with reference to the laws of that State, and the causes of action arose there.

The generally received rule for the interpretation of contracts is that they are to be construed and interpreted according to the laws of the State in which they are made unless from their terms it is perceived that they were entered into with a view to the laws of some other State. The *lex loci contractus* determines the nature, validity, obligation, and legal effect of the contract, and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as when it is to be performed in another place, and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation. *Prentiss v. Savage*, 13 Mass. 20; *Medbury v. Hopkins*, 3 Con. 472; *Everett v. Vendryes*, 19 N. Y. 436; *Hoyt v. Thompson's Exr.*, id. 207; *Curtis v. Leavitt*, 15 N. Y., 227. The contracts before us were made in the State of New York, and between citizens of that State. The plaintiffs were actual inhabitants, and the defendant was a corporation existing by the laws of that State. The contracts were for the carriage and conveyance of the plaintiffs over the road of the defendant, between two places in the same State, to wit, from stations on the line of the road, in the western part of the State to the city of New York. The duty and obligation of the defendant, in the performance of the contracts, commenced and ended within the State of New York. Although the route and line of the defendant's road between the places at which the plaintiffs took their passage and their destination passed through portions of the States of Pennsylvania and New Jersey, by the consent of those States respectively, the parties cannot be presumed to have contracted in view of the laws of those States. The contracts were single and the performance one continuous act. The defendant did not undertake for one specific act, in part performance in one State, and another specific and distinct act in another of the States named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania was a part of the single act of transportation from Attica, or Waverly, in the State of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this State, and which was indivisible. The

¹ Arguments of counsel are omitted. — Ed.

obligation was created here, and by force of the laws of this State, and force and effect must be given to it, in conformity to the laws of New York (*Carnegie v. Morrison*, 2 Metc. 381, Per Shaw, Ch. J.) The performance was to commence in New York, and to be fully completed in the same State, but liable to breach, partial or entire, in the States of Pennsylvania and New Jersey, through which the road of the defendant passed, but whether the contract was broken, and if broken, the consequences of the breach should be determined by the laws of this State. It cannot be assumed that the parties intended to subject the contract to the laws of the other States, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those States and the *lex loci contractus*. The case of the *Peninsular and Oriental Steam Navigation Co. v. Shand* (3 Moo. P. C. n. s. 272), is somewhat analogous in principle to the case at bar. A passenger, by an English vessel belonging to an English company, from Southampton to Mauritius *via* Alexandria and Suez, sustained a loss of his baggage between Alexandria and Mauritius, and it was held that the contract for the passage was to be interpreted by the law of England, the place where the contract was made. The Supreme Court at Mauritius had held that the contract was governed by the French law in force in Mauritius, and refused to the defendants the benefit of an exemption from liability for loss of property, to which they were entitled by the terms of the contract as interpreted by the laws of England, and the judgment was reversed, upon appeal, by the Privy Council.

Whether the actions are regarded as actions of assumpsit upon the contracts, or as actions upon the case for negligence, the rights and liabilities of the parties must be judged by the same standard. The form of the action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action the liability of the defendant, and the rights of the plaintiffs, are based upon the contracts. The defendant owed no duty to the plaintiffs, except in virtue of the contracts, and the obligations for the violation and breach of which an action may be brought are only co-extensive with the contracts made. It follows, that the law of Pennsylvania cannot enlarge or restrict the liability of parties to a contract, which for its validity, effect, and construction, is subject to the laws of New York. The damages to which a party is entitled upon the breach of a contract, or violation of a duty growing out of a contract, and the rule and measure of damages pertains to the right and not to the remedy. It is matter of substance, and the principal thing sought, and not a mere incident to the remedy for the principal thing. It is conceded that the statutes of Pennsylvania have no intrinsic extraterritorial force, and that they bind only within the jurisdictional limits of the State. Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws. In matters of contract, such effect is accorded to statutes of other States, only to carry out the intent of and do justice between the parties, never

to qualify or vary the effect of a contract between parties not citizens of such foreign State, or subject to its laws, and not made in view of the laws of such State. Effect will not be given by the courts of a State to foreign laws in derogation of the contracts, or prejudicial to the rights of citizens. *Liverpool, Brazil, &c. Steam Navigation Company v. Benham*, 2 Law Rep. P. C. Cases, 193; *Hale v. N. J. St. Nav. Co.*, 15 Conn. 539; *Arnott v. Redfern*, 2 Carr. & Payne, 88; *Gale v. Eastman*, 7 Met. 14.

The actions are not given by the laws of Pennsylvania. They grow out of the contracts and the duties resulting from the contracts, and are given by the common law, and, therefore, the laws of another State in an action brought here cannot prescribe the measure of damages, or limit the liability of the parties. *Judgment affirmed.*¹

TALBOTT v. MERCHANT'S DESPATCH TRANSPORTATION CO.

SUPREME COURT OF IOWA. 1875.

[Reported 41 Iowa, 247.]

THIS action is brought to recover the value of four cases of boots, delivered by plaintiff's agents to defendant, a common carrier, at Hartford, Conn., to be transported by said defendant to Des Moines, Iowa. The plaintiff alleges the acceptance of the goods, an agreement to carry, and the failure to deliver, and claims the value thereof — \$220.38. The defendant, by answer, admits that it is a common carrier, the receipt of the goods and the failure to deliver, and avers want of knowledge as to value. The defendant also avers that by the express terms of said agreement, the goods were to be transported and delivered in Des Moines, in like order as they were received, damages from fire excepted; and that without any fault or negligence of said defendant, said cases of boots were, at Chicago, Illinois, destroyed by fire (in the great conflagration of October, 1871), while in transit from Hartford to Des Moines. The bill of lading containing the agreement was annexed as an exhibit to the answer, and it shows the receipt of the goods in good order and the marks thereon, and states that said four cases of boots are "to be forwarded in like good order (dangers of navigation, collision, and fire, and loss occasioned by mob, riot, insurrection, or rebellion, and all dangers incident to railroad trans-

¹ In a few cases it is held that a limitation of liability is governed by the law of the place of contracting where the carriage is to be through that and other States, because the contract is entire and the laws of several places of performance cannot be applied. *Ill. Cent. R. R. v. Beebe*, 174 Ill. 13, 50 N. E. 1019; *R. R. v. Exposit. C. Mills*, 81 Ga. 522, 7 S. E. 916. — Ed.

portation excepted), to depot only, he, or they paying freight and charges for the same as below."

The plaintiff demurred to the answer because: 1. It does not allege that plaintiff has assented to the alleged agreement. 2. It does not show that the loss of said goods occurred through any exception mentioned. 3. The agreement stipulated for absolute exemption from liability, even though the loss occurs through the negligence of defendant, and is therefore against public policy, and void.

This demurrer was sustained, and, the defendants electing to stand upon the answer, judgment was rendered for plaintiff for the amount of the claim. The defendant appeals.¹

COLE, J. It is conceded by the respective counsel that the contract as shown by the bill of lading, containing exceptions from liability for loss by fire, was valid and binding in Connecticut. *Lawrence v. N. Y. P. B. R. R. Co.*, 36 Conn. 63; and in Illinois, *I. C. R. R. Co. v. Morrison*, 19 Ill. 24. And that, by Chap. 13, Laws of 11th G. A. of Iowa, it was enacted "that in the transportation of persons or property by any railroad or other company, or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule, or regulation shall exempt such railroad or other company, person, or firm from the full liabilities of a common carrier, which in the absence of any contract, receipt, rule, or regulation would exist with respect to such persons or property" (see Laws of 1866, p. 121), and that thereby the exceptions in the bill of lading in this case would be inoperative and void in Iowa. The main question, therefore, presented in this case is, whether the contract of affreightment shall be governed by the laws of Connecticut or of Iowa. Respecting the general rule that a contract valid where made is valid everywhere, and that where a contract specifies a place of performance it is to be interpreted by the law of that place, the counsel are also agreed. The question of difficulty in this case is in determining the place of the performance of the contract.

It was held by this court in *McDaniels v. The C. & N. W. Ry. Co.*, 24 Iowa, 412, that a contract of affreightment made in Iowa for the transportation of cattle by railroad from Clinton, Iowa, to Chicago, Illinois, and for their delivery at the latter place, was to be determined by the laws of Iowa, for that the contract was made in Iowa, and was therein partly to be performed. Applying the rule of that case to this, it seems necessarily to follow, that since this contract was made in Connecticut and was there to be partly performed, its validity and effect should be determined by the law of that State. But, without determining that such a rule should be applied to its full extent to every contract or even to this, we here ground our decision of this cause upon the special facts of the case which show that the contract as made was valid in Connecticut, where the contract was made, and in Illinois, where the loss occurred. Whether a different rule would apply if the

¹ Arguments of counsel are omitted. — Ed.

defendants had entered upon the performance of their contract in Iowa and the loss had there occurred, we need not determine.

Our conclusion in this case may be rested upon the general principle, that when there are several possible local laws applicable to the case, that law is to be applied which is most favorable to the contract; or, to state the same rule in other phraseology, when there is a conflict of applicatory laws the parties are presumed to have made part of their agreement that law which is most favorable to its validity and performance. See Wharton on Conflict of Laws, § 429, and authorities there cited; *Arnold v. Potter*, 22 Iowa, 194. The answer, by its admission of the execution of the agreement, by fair implication, if not necessarily, admits that it was accepted or assented to by the plaintiff. Such acceptance, without more, would bind him. See *Mulligan v. Ill. Cent. R. R. Co.*, 36 Iowa, 181.

A fair construction of the exception would exempt the defendant from liability from loss, without its negligence, by fire, although such fire did not result from collision. In other words, the exception relates to the loss either by collision or fire, and not alone from loss resulting from "collisions and fire." Our conclusion, therefore, is that the answer presents a sufficient defence and that the court erred in sustaining a demurrer thereto.

*Reversed.*¹

CURTIS v. DELAWARE, LACKAWANNA, AND WESTERN RAILROAD.

COURT OF APPEALS, NEW YORK. 1878.

[*Reported 74 New York, 116.*]

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial, without a jury.

This action was brought to recover for the loss of a trunk and its contents. The court found, in substance, that plaintiff, on the 9th of October, 1875, took passage on defendant's road from Scranton, Pennsylvania, to New York City, leaving his baggage to be brought by his wife; that, on the 16th of October, 1875, plaintiff's wife and infant son took passage at Scranton for New York, with his and their baggage, consisting of personal clothing, all of which was his property; that the baggage was brought safely by defendant to New York, and was there lost through its negligence.

That by a general act of the Legislature of said Commonwealth of Pennsylvania, passed on the 11th day of April, 1867, and at all times since and still in force, it was enacted and declared as follows:—

"Section 1. Each passenger upon a railroad shall have the right to

¹ See *Hazel v. C. M. & S. P. Ry.*, 82 Ia. 477, 48 N. W. 926. — *ED.*

have carried in the car or place provided for that purpose, in the train in which he or she may be a passenger, his or her personal clothing, not exceeding, inclusive of the trunk or box in which it may be contained, one hundred pounds in weight, and \$300 in value."

"Section 2. No railroad company shall, under any circumstances, be liable for loss or damage of any baggage or property belonging to any such passenger, beyond the said sum of \$300, unless it shall be proven that the excess in value thereof over that sum was duly declared to the agents of the company at the time of its delivery for transportation, and the sum charged by the railroad company for such transportation over and above passage fare was paid :

"Provided, however, that the said declaration shall not relieve the claimant from proving the actual value of the articles alleged to have been lost or damaged; but in no event shall there be any recovery beyond the value thus declared."

Further facts appear in the opinion.¹

MILLER, J. The right of a passenger to recover of a railroad corporation damages arising by reason of a loss of baggage, while travelling upon the railroad, is fully established, and according to the laws of this State there can be no question as to the liability of such company for the loss actually sustained, when it fails to fulfil the contract with the traveller, or is chargeable with negligence, by which the damages are caused. The baggage, for which a recovery was had, was delivered to the defendant at Scranton, in the State of Pennsylvania, to be transported to and delivered in the city of New York. The first question which arises upon this appeal is whether the statute of the State of Pennsylvania, passed in 1867, which limits and defines the liability of railroad corporations upon contracts entered into by them for the transmission of baggage, forms a part of the contract between the plaintiff and the defendant, and should be considered as determining the right to recover and the amount of the recovery. I think that the statute cited has no application, and that the rights of the parties must be determined in accordance with the laws of the State of New York, which are applicable to such contracts, as is manifest by referring to the principles which govern contracts of this description. One of the rules applicable to the subject is that the *lex loci contractus* is to govern, unless it appears upon the face of the contract that it was to be performed in some other place, or made with reference to the laws of some other place, and then the rule of interpretation is governed by the law of the place. *Dyke v. Erie Railway Co.*, 45 N. Y. 113; *Sherrill v. Hopkins*, 1 Cow. 108. The place of delivery was a material and important part of the contract, and until such delivery, the same was not completed and fulfilled. Upon a failure to deliver the baggage to the plaintiff, in the city of New York, there was a breach of the contract; and as the final place of performance was in that city, it would seem to follow that, within the rule laid down, the contract was

¹ Arguments of counsel and part of the opinion are omitted. — Ed.

to be governed, at least so far as a delivery is concerned, by the laws of New York. This certainly was to be done in a different place from where the contract was made, and it is a reasonable inference that it was in the contemplation of the parties at the time, and that it was entered into with reference to the laws of the place where it was to be delivered. So also, when it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed. *Sherill v. Hopkins*, *supra*, p. 108, and authorities there cited; *Thompson v. Ketcham*, 8 Johns. 189; 4 Kent's Com. 459. The place of final performance of the contract being in the city of New York, although the transportation was mostly through other States, no reason exists why a failure to deliver the baggage should not be controlled by the laws which prevail at the place of delivery. It is said that the contract is entire and indivisible, and we are referred to some cases outside of this State, which, it is claimed, sustain the doctrine that the locality where the contract was made, in cases of this character, must control. None of the cases cited are entirely similar to the one at bar and do not involve the precise point now considered. But even were it otherwise, they are not, I think, controlling, as no reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered.

BURNETT v. PENNSYLVANIA RAILROAD.

SUPREME COURT OF PENNSYLVANIA. 1896.

[Reported 176 *Pennsylvania*, 45.]

FELL, J. The refusal of the court to charge that "as the contract for transportation was made in New Jersey it will be enforced in this State as in that, and as the defendant was released from responsibility by the free pass the verdict must be for the defendant," raises the only question to be considered. The plaintiff was employed by the defendant as a flagman at Trenton, N. J. He applied for and was granted free transportation for himself, his wife and daughter, to Elmira, N. Y. He received two passes, — one from Trenton to Philadelphia, the terms of which do not appear in evidence; the other, an employee's trip pass from Philadelphia to Elmira, by the terms of which he assumed all risks of accident. He was injured at Harrisburg, Pa., through the admitted negligence of the defendant's employees.

It was proved at the trial that under the laws of New Jersey the contract by which the plaintiff in consideration of free transportation assumed the risk of accident was valid, and that in that State he could not recover; and it is conceded that in Pennsylvania the decisions are

otherwise, and that such a contract will not relieve a common carrier from responsibility for negligence. *Goldey v. Penna. R. R. Co.*, 30 Pa. 242; *Penna. R. R. Co. v. Henderson*, 51 Pa. 315; *Penna. R. R. Co. v. Butler*, 57 Pa. 335; *Buffalo, Pittsburg & Western R. R. Co. v. O'Hara*, 12 W. N. C. 478. The question then is: By the laws of which State is the responsibility of the defendant to be determined?

The defendant is a corporation of the State of Pennsylvania. The injury occurred in the operation of its road in this State. The passes, although issued and delivered in New Jersey, were for transportation from the station in Trenton directly across the Delaware river into this State. The service was to be rendered here; this was the place of performance.

Generally as to its formalities and its interpretation, obligation, and effect, a contract is governed by the laws of the place where it is made, and if it is valid there it is valid everywhere; but when it is made in one State or country to be performed in another State or country its validity and effect are to be determined by the laws of the place of performance. It is to be presumed that parties enter into a contract with reference to the laws of the place of performance, and unless it appears that the intention was otherwise those laws determine the mode of fulfilment and obligation and the measure of liability for its breach. *Daniel on Negotiable Instruments*, 658; *Byles on Bills*, 586; 2 *Kent's Commentaries*, 620; *Wharton on the Conflict of Laws*, § 401; *Story on the Conflict of Laws*, § 280; *Scudder v. Union National Bank*, 91 U. S. 406; *Brown v. C. & A. R. R. Co.*, 83 Pa. 316; *Waverly Bank v. Hall*, 150 Pa. 466. The decision in *Brown v. C. & A. R. R. Co.* (*supra*) seems to be conclusive of this case. In that case a ticket was issued in Philadelphia by a New Jersey corporation operating a railroad in that State, and the plaintiff's trunk was delivered to the defendant in Philadelphia, and it did not appear where it had been lost. The liability being admitted, the question was whether the laws of Pennsylvania limiting the amount of liability applied. It was held that as the service was to be rendered by a New Jersey corporation in New Jersey the laws of the place of performance controlled. It was said in the opinion by SHARSWOOD, J.: "The negligence of which the defendants are presumed to have been guilty was in the course of the exercise of their franchises as a New Jersey corporation, and the extent of their liability is therefore to be determined by the laws of that State."

*The judgment is affirmed.*¹

¹ *Acc. Barter v. Wheeler*, 49 N. H. 9. — Ed.

LORING v. NEPTUNE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1838.

[Reported 20 *Pickering*, 411.]

SHAW, C. J.¹ The general average in the present case was made up and adjusted at Hamburg, the port of destination, at which the several interests liable to contribute were necessarily to be separated from each other. Hamburg therefore was the proper place for the adjustment and payment of this general average. Such general average must necessarily be adjusted according to the laws and usages of the place where the adjustment was made.²

SECTION IX.

(C) OBLIGATIONS QUASI EX CONTRACTU.

BRACKETT v. NORTON.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1823.

[Reported 4 *Connecticut*, 517.]

HOSMER, C. J.³ The general question in the case is whether the law implies a contract that the defendant shall pay the plaintiff for the services performed by him. . . . The services of the defendant having been rendered in the State of New York, under a contract made in that State, their laws are the standard by which the case must be determined.⁴ . . .

¹ Part of the opinion only is given. — Ed.

² Acc. *Simonds v. White*, 2 B. & C. 805; 1 Clunet, 133 (R. O. H. G. 28 Dec. '72); 5 Clunet, 599 (Rouen, 20 Mar. '78); 8 Clunet, 311 (Holland, 11 Feb. '78); 20 Clunet, 949 (Antwerp, 14 Jan. '92).

If the voyage is completely broken up at an intermediate port of refuge, it has been held that the adjustment of general average should be according to the law there prevailing. *Mavro v. Ins. Co.*, L. R. 10 C. P. 414. In Norway, however, it has been held that it should be adjusted at the port of refuge according to the law of the port of intended destination. 15 Clunet, 151 (25 Mar. '86). If after disaster the cargo is forwarded to destination, general average should then at any rate be computed according to the law of the port of destination. *Nat. Board v. Melchers*, 45 Fed. 643. — Ed.

³ Part of the opinion only is given. — Ed.

⁴ Acc. *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456. — Ed.

PART IV.
THE RECOGNITION AND ENFORCEMENT OF RIGHTS.

CHAPTER XI.
PERSONAL RELATIONS.

SECTION I.
CAPACITY.

SOMERSET *v.* STEWART.

KING'S BENCH. 1772.

[*Reported Loft, 1.*]

ON return to an *habeas corpus*, requiring Captain Knowles to show cause for the seizure and detainure of the complainant Somerset, a negro, the case appeared to be this: that the negro had been a slave to Mr. Stewart, in Virginia; had been purchased from the African coast, in the course of the slave trade, as tolerated in the plantation; that he had been brought over to England by his master, who, intending to return, by force sent him on board of Captain Knowles's vessel, lying in the river; and was there, by the order of his master, in the custody of Captain Knowles, detained against his consent, until returned in obedience to the writ. And under this order and the facts stated, Captain Knowles relied in his justification.¹

¹ The arguments of Mr. Hargrave and Mr. Alleyne for the negro, and of Mr. Wallace and Sarjeant Davy for the defendant, are omitted; they will be found at length in 21 Howell's State Trials, 1. In the course of the argument, "the court approved Mr. Alleyne's opinion of the distinction how far municipal laws were to be regarded; instanced the right of marriage, which, properly solemnized, was in all places the same, but the regulations of power over children from it, and other circumstances, very various." At the end of the arguments, Lord MANSFIELD said: "The now question is, whether any dominion, authority, or coercion can be exercised in this country on a slave according to the American laws? The difficulty of adopting the relation without adopting it in all its consequences is indeed extreme; and yet many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate." — ED.

Lord MANSFIELD, C. J.¹ We pay all due attention to the opinion of Sir Philip Yorke and Lord Chief Justice Talbot, whereby they pledged themselves to the British planters for all the legal consequences of slaves coming over to this kingdom or being baptized: recognized by Lord Hardwick, sitting as Chancellor, on the 19th of October, 1749, that trover would lie; that a notion had prevailed, if a negro came over or became a Christian, he was emancipated, but no ground in law; that he and Lord Talbot, when attorney and solicitor-general, were of opinion that no such claim for freedom was valid; that though the statute of tenures had abolished villains regardant to a manor, yet he did not conceive but that a man might still become a villain in gross, by confessing himself such in open court. We are so well agreed that we think there is no occasion of having it argued (as I intimated an intention at first) before all the judges, as is usual, for obvious reasons, on a return to a *habeas corpus*. The only question before us is, whether the cause on the return is sufficient; if it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states that the slave departed and refused to serve; whereupon he was kept to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from memory. It's so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

COMMONWEALTH v. GREEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1822.

[Reported 17 *Massachusetts*, 515.]

PARKER, C. J.² The prisoner, having been convicted, by the verdict of a jury, of the crime of murder, at the last term of the court, moved for a new trial; because, as alleged in his motion, one Sylvester Stoddard, who had been sworn as a witness on the part of government, and who had testified to the jury, had been convicted of the crime of

¹ Lord MANSFIELD first cited the return to the writ. — ED.

² Part of the opinion is omitted. — ED.

larceny, in a court having jurisdiction of the offence, within the State of New York ; whereby, as is alleged, he was rendered infamous, and for that reason his testimony could not be received in a court of justice in this Commonwealth. . . .

If New York is to be considered on the footing of a foreign State, the difficulty of giving such effect to a conviction seems insuperable. The objection to the witness on account of infamy must be supported by a record of the judgment. What is a record of a foreign State, and how it shall be authenticated, are questions of delicacy and difficulty, which it would be almost impossible to settle in the course of a trial, which must always proceed with as little interruption and delay as possible. Whether the facts, which would be here deemed an infamous crime, are the same which constitute the like offence in the country from which the record comes, the court would have no means of knowing with certainty. The crime of treason is known to be different in different countries ; what is felony, also, in one country may not be felony in another ; and it is competent to the legislature of every nation to attach disabilities to the commission of offences which, by the laws of other nations, may be wholly without such consequences.

Thus one State may enact that the detention of another's property after demand by the owner, shall be deemed and taken to be larceny, and punished as such ; and that a general description of the offence, in the indictment, should be sufficient ; so that a foreign court could never know, by inspection of a copy of a record, what were the ingredients of the crime which had been punished.

So, also, the non-payment of a debt may be branded with infamy by the laws of any country, and designated by some term usually denoting the *crimen falsi* ; and this class of crimes may be enlarged so as to comprehend transactions which in other countries are considered venial, or at least not criminal.

If the common law were unchangeable, the courts of countries which adopt it as part of their code might know with certainty the nature and character of crimes ; but while every country has its legislature, which has a right to alter or repeal the common law, such certainty cannot be attained. Treason, by the common law, renders the convict infamous ; but many acts are made treason by positive enactments in one country, which would not be so in another. The infamy, therefore, consequent upon treason, ought not to pass beyond the country in which the crime is committed.

Another objection to receiving such evidence for such a purpose is, that a person, who may have left his native country convicted of crime, however long he may have lived in his adopted country, and whatever reputation he may have acquired by a course of upright and honorable conduct, has no means of being restored to credit. For the pardoning power of the country where he resides cannot reach an offence committed without its jurisdiction. And thus it may happen that a naturalized citizen, who, by his virtue and talents, and a long course of

irreproachable conduct, may have obtained the confidence of his fellow-citizens, and even their suffrages for the most important offices, may be met in a court of justice by some obsolete record of a conviction of some crime, perhaps merely political, which may be deemed infamous in the country from which he came; and can have no power of effacing the stain, without soliciting a pardon where he may be wholly forgotten, and where there can be no evidence of such a change of life and manners as would entitle him to the clemency of the offended power.

It is these difficulties, with others which might be mentioned, which justify the principle that appears to be adopted by the English courts; and which we are disposed to think is a maxim of general law, recognized by all nations, viz. that the penal laws of a country do not reach, in their effects, beyond the jurisdiction where they are established. It is so laid down by an eminent judge in the case of *Folliott v. Ogdén*, 1 H. Black. 181, and in a treatise of public law by Martens, the same principle is advanced in more extensive and unlimited terms. In the 24th section of his work he says, "The criminal power being confined to the territory, no act of its authority can be exercised in foreign countries without violating their rights." In the 25th section he says, "By the same principles a sentence, which attacks the *honor, rights*, or property of a criminal, cannot extend beyond the limits of the territory of the sovereign who pronounced it. So that he who has been declared infamous in one country is infamous in a foreign country *in fact*, but not in *law*;" which terms the author probably uses in allusion to the civil law, resembling, in some degree, our distinction between competency and credibility. By *infamia juris* is meant infamy established by law as the consequence of crime; *infamia facti* is where the party is supposed to be guilty of such crime, but it has not been judicially proved. "And the confiscation of his property cannot affect his property situated in a foreign country. To deprive him of his honor and property judicially there also, would be to punish him a second time for the offence." To refuse a man the right to be a witness on account of a conviction in another country, would be to suffer that conviction to have force here, and, in some measure, to carry it into execution.

If it be said that it will be dangerous to the lives and reputations of the citizens, that foreigners, who have been rendered infamous abroad, should be admitted to testify against them, the answer is, that their former condition and character may be made known to the jury to enable them to judge of their credibility; and this without depriving them of any valuable personal right by reason of their conviction abroad. Their right to stand in court as *probi et legales homines* is sustained; but as all other men, the value of the testimony is to be estimated by their general reputation, and even by the proof of particular facts showing a conviction and punishment for crime; and the effect of such proof may be always rebutted by evidence of good conduct, a virtuous life, etc.

Infamy is, in truth, part of the punishment of the *crimen falsi*,

although not expressed in the sentence ; and it creates a disability to testify, just as excommunication in a spiritual court does to sue in the courts of common law. To hold a person incompetent on account of such a conviction, is to give effect to the conviction, and to enforce the punishment ; and thus the penal laws of one country would reach into others, contrary to the principle above stated.

It would seem to be consistent with sound principles also that, wherever there is a crime or punishment remaining in force, there should be a power of pardon ; but the act of pardon cannot operate upon an offence committed under another jurisdiction ; nor can it extend beyond the jurisdiction of the offended sovereign. So that one who has once exposed himself to a punishment which renders him infamous in the country where the offence was committed, must be perpetually stigmatized if he remove into another country. This is sufficient to show the reasonableness of limiting the penal effects of crime to the country whose laws have been violated.

We do not find, after a careful examination, as well by the counsel for the prisoners, as by ourselves, that the question before us has arisen in the English courts, or in those of any of the United States. All the cases in the English books in which objections were made to the competency of witnesses on the ground of infamy, seem very clearly to have been cases of conviction in some of their own courts. Indeed the strictness of the rule under which such evidence is admitted, seems almost necessarily to exclude conviction in any foreign court. The objector must have the record in his hands, and must show not only a conviction, but a judgment thereon. We think the silence of the English books on this subject, even among the multitude of treatises on evidence, which have lately issued from the press, furnishes strong reasons to believe that objections of this nature, if heard at all, only go to the credibility of witnesses.

The only book we have seen which intimates a different doctrine is one upon the principles of evidence, by a Mr. Glassford of Scotland, referred to in the argument for the prisoner ; a respectable writer, but hitherto unknown to the courts of law in this country. Speaking of incompetency by reason of infamy, he inquires into the proof necessary to establish the fact ; and supposes that an exemplification of a record, from England or Ireland, would be received as proof in Scotland. How far the peculiar organization of the Scotch courts, and the system of rules by which they are governed, may have had an effect on their law of evidence, we cannot know ; nor whether the circumstance, that the three countries are under one sovereign, and one legislative power, may not have had its effects. The examples produced by the writer are from England and Ireland only ; and from this it would seem that his doctrine would not apply to the records of a country strictly foreign. Indeed such records cannot properly be exemplified ; but must be proved by testimony, as other facts are proved.

But it has been argued by the counsel for the prisoner, that, although

a conviction in a court of a country strictly foreign, should not be held to take away the competency of a witness, yet that such is the relation of the several States which compose the American Union with each other, that the same law ought not to prevail here, as the States are not in fact foreign to each other. . . .

We have come to the opinion that there is no difference in the effect of a conviction, in regard to the competency of a witness, between any State in this Union and any foreign State; and that in neither case is the witness to be excluded on account of such conviction.¹

GATES v. BINGHAM.

SUPREME COURT OF ERRORS, CONNECTICUT. 1881.

[*Reported 49 Connecticut, 275.*]

ASSUMPSIT for the rent of a house, brought to the Court of Common Pleas, and tried to the court, on the general issue with notice, before MATHER, J. The following facts were found by the court:—

In 1871 Charles M. Pendleton was appointed by the court of probate for the district of Norwich in this State, conservator of the defendant, who was then a resident of the town of Norwich; the court finding that by reason of improvidence and prodigality he had become incapable of managing his affairs. Bingham was at that time twenty-three years of age. Pendleton duly qualified as conservator and has never been removed. . . . In December, 1876, the defendant married in Worcester, and at that time hired of the plaintiff a tenement there, at the rate of fifteen dollars a month, payable at the end of every month, where he resided with his wife till October 13, 1877.

The defendant paid the rent of this tenement until the 15th of July, 1877, but the rent from that time until October 13 has never been paid, and for the recovery of it this suit is brought. The tenement was a suitable one for himself and family, and the rent reasonable, and the defendant and his family during the time were not otherwise provided with lodging. His conservator knew that he had hired a tenement of the plaintiff, and sent money to the defendant at times to pay the rent. The plaintiff was informed by the defendant that he had a conservator.

The defendant requested the court to rule that his disability by reason of the appointment of a conservator followed and was attached to his person; and that to render him liable in this suit, the same

¹ *Acc. Sims v. Sims*, 75 N. Y. 466; *C. v. Hanlon*, 3 Brewst. 461 (*semble*). *Contra*, *Clark v. Hall*, 2 H. & M'H. 378 (*semble*); *S. v. Foley*, 15 Nev. 64; *Chase v. Blodgett*, 10 N. H. 24; *S. v. Candler*, 3 Hawks, 393. See *Campbell v. S.*, 23 Ala. 44; *Klein v. Dinkgrave*, 4 La. Ann. 540; *Uhl v. C.*, 6 Grat. 706. — ED.

approval of the contract by the conservator would be required as would have been necessary if he had continued to reside in this State. The court refused so to rule; but ruled that the law of the place where the contract was made should govern, and that the disability of the defendant, by reason of the conservatorship, only continued while he resided within the jurisdiction of this State.

Upon these facts the court rendered judgment for the plaintiff. The defendant brought the record before this court by a motion in error.¹

GRANGER, J. There is clearly no error in the charge. The disability under which one is placed, with regard to his power to make contracts, by having a conservator appointed over him, is created wholly by statute, and can have no operation where the statute does not operate. It is a well settled principle that no statute can operate beyond the territorial limits of the State in which it was enacted. While the defendant was residing in the State of Massachusetts he was *sui juris*, and if incapable of managing his own affairs the only mode of securing a legal supervision for him was by proceeding under the laws of that State in the same manner as in the case of any other of its inhabitants. The defendant had in fact become an inhabitant and citizen of that State, and had ceased to be a citizen of Connecticut.

It does not affect the case that the suit is brought in this State. The contract upon which it is brought, being a valid and binding one in the State where it was made, is equally valid and binding in this State.

It cannot affect the case that the plaintiff knew that the defendant was under a conservator in Connecticut. Since he was legally free from the control of the conservator in Massachusetts, the fact that he had previously been under a conservator in this State was of no importance.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

¹ Part of the statement of facts and the arguments are omitted. — Ed.

WORMS v. DE VALDOR.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1880.

[*Reported 49 Law Journal, New Series, Chancery, 261.*]

THIS was an action for the delivery up and cancellation of certain bills of exchange accepted by the plaintiff, a French subject in France.

Objections were taken in the several statements of defence that the plaintiff, by French law, was incapacitated from suing without the intervention of his "Conseil Judiciaire," by reason of his having been adjudicated a "prodigal," and placed under a "Conseil de Famille" by the Tribunal of First Instance of the department of the Seine, the duly authorized court in France for that purpose.¹

FRY, J. The first objection which has been raised to the plaintiff's case is founded upon the fact that some time prior to the date of the bills of exchange he had been placed under that proceeding of the French law which is known as "Conseil de Famille," and it is said that that fact prevents his being able to sue in this court. That argument is based upon the 13th section of the Code Civil, which prevents "prodigals," among other things, from pleading without the assistance of counsel, who may be assigned by the court. I declined to stop the case on that preliminary objection, inclining to the view that if a change of status were effected by an order of a French court, this court would not take notice of a personal disqualification caused by such change of status. Assuming the proposition to be true that a personal disqualification was introduced by the judgment of the French court, I still adhere to that view, and I read a passage from Mr. Justice Story's "Conflict of Laws" (§ 104) as expressing the view I entertain: "Personal disqualifications not arising from the Law of Nature, but from the principles of the customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarded in other countries where the like disqualifications do not exist; hence the disqualification resulting from heresy, excommunication, Popish recusancy, infamy, and other penal disabilities, are not enforced in any other country except that in which they originate. They are strictly territorial, so the state of slavery will not be recognized in any country where institutions and policy prohibit slavery." The learned author might have gone further with respect to slavery, for it is well known that in the celebrated case of *Somerset*, 20 Howell's State Trials, 1, the courts of this country, where villenage has never been abolished, declined to recognize the status of slavery resulting from the legislation of any other country.

It appears to me, however, that upon the point which is left for me to decide without the assistance of any French lawyers, that a part of the proceedings referred to was not to change the status of the plaintiff.

¹ Arguments of counsel are omitted. — Ed.

According to French jurisprudence, before the passing of the Code Napoléon, prodigality was one of the grounds which is known as interdiction: such interdiction as was passed in the case of a lunatic, for instance. But by the code matters were altered in that respect, and an interdict cannot now be passed against a person on the ground of prodigality. I find this laid down in Toullier's work on French law (2 *Le Droit Civil Français*, 5th ed. 443): "L'ancienne jurisprudence avait mis la prodigalité au nombre des causes qui pouvaient faire interdire un majeur; mais le Code n'en admet plus d'autres que l'état habituel d'imbécillité de démence ou de fureur." Then he says (Ib. 476): "À la différence de l'interdiction qui opère un véritable changement d'état, la nomination d'un conseil judiciaire n'en opère aucun dans la personne qui s'y trouve soumise; elle continue d'exercer par elle-même toutes ses actions, tous ses droits civils et politiques de voter dans les assemblées de famille et dans les assemblées primaires et électorales, de faire, en un mot, tous les actes de la vie civile: elle est seulement assujettie à prendre pour certains actes d'exception l'avis du conseil, qui doit la prémunir contre les erreurs et les surprises auxquelles elle est exposée dans la disposition de ses biens ou dans la direction de ses affaires." There being, therefore, no change of status but merely a requirement of French law in particular cases, it appears to me that that does not prevent the plaintiff in this case from suing in this action.

SECTION II.

MARRIAGE.

HYDE v. HYDE.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. 1866.

[*Reported Law Reports*, 1 *Probate and Divorce*, 130.]

LORD PENZANCE, Judge Ordinary. The petitioner in this case claims a dissolution of his marriage on the ground of the adultery of his wife. The alleged marriage was contracted at Utah, in the territories of the United States of America, and the petitioner and the respondent both professed the faith of the Mormons at the time. The petitioner has since quitted Utah, and abandoned the faith, but the respondent has not. After the petitioner had left Utah, the respondent was divorced from him, apparently in accordance with the law obtaining among the Mormons, and has since taken another husband. This is the adultery complained of.

Before the petitioner could obtain the relief he seeks some matters would have to be made clear and others explained. The marriage, as it is called, would have to be established as binding by the *lex loci*, the divorce would have to be determined void, and the petitioner's conduct

in wilfully separating himself from his wife would have to be accounted for. But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered "husband" and "wife" in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this court cannot properly exercise any jurisdiction over such unions.

Marriage has been well said to be something more than a contract, either religious or civil — to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognized one throughout Christendom: the laws of all Christian nations throw about this status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms — countries in which this institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian "wife." In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things — laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word "wife." But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognize and intend by the words "husband" or "wife," but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer. The language of Lord Brougham, in *Warrender v. Warrender*, 2 Cl. & F. 531, is very appropriate to these considerations: "If, indeed, there go two things under one and the same name in different countries — if

that which is called marriage is of a different nature in each — there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore, all that the courts of one country have to determine is whether or not the thing called marriage — that known relation of persons, that relation which those courts are acquainted with, and know how to deal with — has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer." "Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such nature as that it is capable of being followed by, and subsisting with, another, polygamy being there the essence of the contract."

Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce; and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one third of his income. If these and the like provisions and remedies were applied to polygamous unions, the court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence. For it would be quite unjust and almost absurd to visit a man who, among a polygamous community, had married two women, with divorce from the first woman,

on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriages, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers.

If, then, the provisions adapted to our matrimonial system are not applicable to such a union as the present, is there any other to which the court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex.

This is hardly denied in argument, but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; that this court will be justified in treating such first union as a Christian marriage, and all subsequent unions, if any, as void; the first woman taken to wife as a "wife" in the sense intended by the Divorce Act, and all the rest as concubines. The inconsistencies that would flow from an attempt of this sort are startling enough. Under the provisions of the Divorce Acts the duty of cohabitation is enforced on either party at the request of the other, in a suit for restitution of conjugal rights. But this duty is never enforced on one party if the other has committed adultery. A Mormon husband, therefore, who had married a second wife, would be incapable of this remedy, and this court could in no way assist him towards procuring him the society of his wife if she chose to withdraw from him. And yet, by the very terms of his marriage compact, this second marriage was a thing allowed to him, and no cause of complaint in her who had acquiesced in that compact. And as the power of enforcing the duties of marriage would thus be lost, so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further, and declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had, according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the application of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration; and all this

without any act done with which he would be expected to reproach himself, or of which either woman would have the slightest right to complain. These difficulties may be pursued further in the reflection that if a Mormon had married fifty women in succession, this court might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life.

Is the court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily presuppose duties. There are no conjugal duties but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law. So much for the reason of the thing.

There is, I fear, little to be found in our books in the way of direct authority. But there is the case of *Ardaseer Cursetjee v. Perozeboye*, 10 Moo. P. C. 375, 419, in which the Privy Council distinctly held that Parsee marriages were not within the force of a charter extending the jurisdiction of the ecclesiastical courts to Her Majesty's subjects in India, "so far as the circumstances and occasions of the said people shall require." And the following passage sufficiently indicates the grounds upon which the court proceeded: "We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws or some customs having the effect of laws which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as from time out of mind were incident to their own caste, nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages."

In conformity with these views the court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

*Petition dismissed.*¹

¹ Following this case, it was decided by STIRLING, J., *In re Bethell*, 38 Ch. D. 220, that the issue of a marriage contracted in South Africa between an Englishman and a

SUTTON v. WARREN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1845.

[Reported 10 Metcalf, 451.]

ASSUMPSIT on a promissory note for \$1,800, given by the defendant to Ann Sutton, on the 10th of August, 1840. The case was submitted to the court upon the following facts agreed on by the parties:—

The note declared on was given for money lent by Ann Sutton to the defendant. The plaintiff and said Ann Sutton are natives of England, and were married at Duffield, in England, on the 28th of November, 1834. About one year after their marriage, they came to this country, where they have lived, as husband and wife, ever since. The said Ann was the own sister of the mother of the said Samuel Sutton, the plaintiff, and has always since said marriage gone by the name of Ann Sutton. Her former name was Ann Hills.

Judgment to be rendered for the plaintiff, if the court are of opinion that he is entitled to recover; otherwise, he is to be nonsuit.¹

HUBBARD, J. It is a well-settled principle in our law that marriages celebrated in other States or countries, if valid by the law of the country where they are celebrated, are of binding obligation within this Commonwealth, although the same might, by force of our laws, be held invalid, if contracted here. This principle has been adopted, as best calculated to protect the highest welfare of the community in the preservation of the purity and happiness of the most important domestic relation in life. *Greenwood v. Curtis*, 6 Mass. 378; *Medway v. Needham*, 16 Mass. 157; *West Cambridge v. Lexington*, 1 Pick. 506; *Compton v. Bearcroft*, Bul. N. P. 114; *Scrimshire v. Scrimshire*, and *Middleton v. Janverin*, 2 Haggard, 395, 437. There is an exception, however, to this principle, in those cases where the marriage is considered as incestuous by the law of Christianity, and as against natural law. And these exceptions relate to marriages in the direct lineal line of consanguinity, and to those contracted between brothers and sisters; and the exceptions rest on the ground that such marriages are against the laws of God, are immoral, and destructive of the purity and happiness of domestic life. But I am not aware that these exceptions, by any general consent among writers upon natural law, have been ex-

native woman, according to the native custom, could not take as legitimate. The court said: "I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England, unless it be formed on the same basis as marriages throughout Christendom, and be in its essence 'the voluntary union for life of one man and one woman, to the exclusion of all others.'" In *Brinkley v. Attorney-General*, 15 P. Div. 76, a marriage in Japan, according to the native custom, between an Englishman and a native, was held to be valid in England. See *Re Ullee*, 53 L. T. Rep. 711.—Ed.

¹ Arguments of counsel are omitted.—Ed.

tended further, or embraced other cases prohibited by the Levitical law. This subject has been carefully discussed by Chancellor Kent, in the case of *Wightman v. Wightman*, 4 Johns. Ch. 343; and while he is clear as to the exceptions before stated, he thinks, beyond them there is a diversity of opinion among commentators. 2 Kent Com., Lect. 26. See also Story's *Conflict of Laws*, §§ 113, 114. There is also a provision in our statutes, making marriages void in this State, where persons resident in the State, whose marriage, if solemnized here would be void, in order to evade our law, and with the intention of returning to reside here again, go into another State or country and there have their marriage solemnized. Rev. Sts., c. 75, § 6. The only object of this provision is, as stated by the commissioners in their report, to enforce the observance of our own laws upon our own citizens, and not to suffer them to violate regulations founded in a just regard to good morals and sound policy. As to the wisdom of this provision it is unnecessary here to speak. But the provision is noticed, to show that it has not been overlooked in the consideration of the case at bar, which presents no such state of facts.

In view of the whole matter, considering it as a part of the *jus gentium*, we do not feel called upon to extend the exceptions further. By our statutes, the marriage contracted between Samuel Sutton, the plaintiff, and Ann Hills, his mother's sister, if celebrated in this State, would have been absolutely void. But by the law of England, this marriage, at the time it was contracted, viz. in November, 1834, was voidable only, and could not be avoided until a sentence of nullity should be obtained in the spiritual court, in a suit instituted for that purpose. See Poynter on *Marriage and Divorce*, 86, 120; 2 Stephen's Com. 280. In *The Queen v. Inhabitants of Wye*, 7 Adolph. & Ellis, 771, and 3 Nev. & P. 13, the Court of King's Bench affirmed the doctrine, and held such a marriage voidable only, and that, till avoided, it was valid for all civil purposes. Rosc. Crim. Ev. (2d ed.) 286. Since this marriage was contracted, the St. of 6 Wm. IV., c. 54, has been passed, making such marriages which should afterwards be celebrated absolutely void.

In the present case, the marriage of these parties was not void by the laws of England, though voidable in the spiritual court. It never was avoided, and though absolutely prohibited by our laws, yet not being within the exception, as against natural law, we do not feel warranted in saying the parties are not husband and wife. The plaintiff, Samuel Sutton, sues on a promissory note given to the said Ann Sutton, and, as her husband, he can maintain an action thereon, in his own name alone, there being no other cause of objection raised than the one stated in regard to the legality of their marriage. Bayley on *Bills* (2d Amer. ed.), 42; Clancy, *Husb. & Wife*, 4.

Judgment for the plaintiff.

UNITED STATES *v.* RODGERS.

DISTRICT COURT OF THE UNITED STATES, E. DIST. OF PENNSYLVANIA, 1901.

[*Reported 109 Federal Reporter, 886.*]

J. B. McPHERSON, District Judge. The relator is a naturalized citizen of the United States, and is the husband of Rosa Devine, and the father of her idiot son, William. Rosa and William are Russian Jews, whom the commissioner of immigration at the port of Philadelphia has ordered to be deported, on the ground that both are aliens, and that William is an idiot, and Rosa is a pauper that is likely to become a public charge. The alienage of both is denied upon the ground that when the husband and father became a citizen the wife and child ceased to be aliens; and this is the only point to be decided. The decision is admitted to depend upon the answer to be given to the question whether Rosa is the relator's lawful wife, or, rather, whether she is to be so regarded in this State; for she is her husband's niece, and such a marriage, if originally celebrated in Pennsylvania, would be void. Act 1860, § 39 (P. L. 893); 1 *Purd. Dig.* (ed. 1872), p. 54. Among the Jews in Russia, however, where the ceremony took place, it has been satisfactorily proved that a marriage between uncle and niece is lawful, and, being valid there, the general rule undoubtedly is that such a marriage would be regarded everywhere as valid. But there is this exception, at least, to the rule: If the relation thus entered into elsewhere, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court sitting in this State to recognize the foreign marriage as valid. I think the following quotation from Dr. Reinhold Schmid, a Swiss jurist of eminence, to be found in *Whart. Confl. Laws* (2d ed.), § 175, correctly states the proper rule upon this subject:—

“When persons married abroad take up their residence with us, it is agreed on all sides that the marriage, so far as its formal requisites are concerned, cannot be impeached, if it corresponds either with the laws of the place where the married pair had their domicile, or with those where the marriage was celebrated. But we must not construe this as implying that the juridical validity of the marriage depends absolutely on the laws of the place under whose dominion it was constituted; for the fact that a marriage was void by the laws of a prior domicile is no reason why we should declare it void if it united all the requisites of a lawful marriage as they are imposed by our laws. So far as concerns the material conditions of the contract of marriage, we must distinguish between such hindrances as would have impeded marriage, but cannot dissolve it when already concluded, and such as would actually dissolve a marriage if celebrated in the face of them. A matrimonial relation that in the last sense is prohibited by our laws cannot be tolerated in our territory, though it was entered into by foreigners before they visited us. We will, therefore, tolerate no polygamous or incestuous unions of foreigners settling within our limits.”

Other authority may be found in *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, where it is said, in determining the effect of a statute that forbade sexual intercourse between persons nearer of kin than cousins:—

“We hold, therefore, that by section 7019, Rev. St., sexual commerce as between persons nearer of kin than cousins is prohibited, whether they have gone through the form of intermarriage or not; nor is it material that the marriage was celebrated in a country where it was valid, for we are not bound, upon principles of comity, to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based upon principles of sound public policy, because they have assumed, in another State or country, where it was lawful, the relation which led to the acts prohibited by our laws.”

See also *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 8 Am. Dec. 131, and *In re Stall's Estate*, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539.

In view of this exception to the general rule, it seems to me to be impossible to recognize this marriage as valid in Pennsylvania, since a continuance of the relation here would at once expose the parties to indictment in the criminal courts, and to punishment by fine and imprisonment in the penitentiary. In other words, this court would be declaring the relation lawful, while the court of quarter sessions of Philadelphia County would be obliged to declare it unlawful. Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public.

SECTION III.

LEGITIMACY.

BIRTWHISTLE v. VARDILL.

HOUSE OF LORDS. 1840.

[*Reported 7 Clark & Finnelly, 895.*]

THIS case came from the King's Bench on Writ of Error. The case was first argued in the House of Lords in 1830. No judgment was then given, but on account of the difficulty and novelty of the case, it was ordered to be reargued.¹ On the first of July, 1839, the case was reargued before TINDAL, C. J., VAUGHAN, BOSANQUET, PATTESON, WILLIAMS, COLERIDGE, COLTMAN, and MAULE, JJ., and PARKE and GURNEY, BB. A question was framed and put to the judges; and their unanimous opinion was delivered in the following terms.

TINDAL, Lord Chief Justice. My Lords, the facts of the case upon which your Lordships propose a question to Her Majesty's judges are these: "A. went from England to Scotland, and resided and was domiciled there, and so continued for many years, till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland, according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child take place in Scotland, such child born in Scotland before the marriage is equally legitimate with children born after the marriage, for the purpose of taking land, and for every other purpose. A. died seised of real estate in England, and intestate." And your Lordships, upon the foregoing state of facts, found this question, viz.: "Is B. entitled to such property as the heir of A.?" And in answer to the question so proposed to us, I have the honor to state to your Lordships, that it is the opinion of all the judges who heard the argument that B. is not entitled to such property as the heir of A. We have, indeed, reason to lament that we have been deprived of the assistance of one of our learned brethren who heard the case argued at your Lordship's bar, the late Mr. Justice VAUGHAN; but as he had expressed a concurrent opinion upon the case at a meeting held immediately after the argument, I feel myself justified in adding the authority of his name to that of the other judges.

My Lords, the grounds and foundation upon which our opinion rests are briefly these: That we hold it to be a rule or maxim of the law of England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of the comity of nations.

My Lords, to understand the nature and force of this rule of our law, "that the heir must be a person born in actual matrimony in order to enable him to take land in England by descent," and to perceive, at the same time, the positive and inflexible quality of this rule, and how closely it is annexed to the land itself, it will be necessary to consider the earlier authorities in which that rule is laid down and discussed, both before and subsequently to the statute of Merton,

and more particularly the legal construction and operation of that statute. . . .

At the parliament holden at Merton, in the 20th Henry III., the statute was framed, which will be found to have a strong and direct application to the present question. That statute has not upon the original roll the title prefixed thereto, upon which observations were made at your Lordships' bar, that it showed the intention of the law to have been no more than to declare the personal status of those who are described in such statute. In the edition of the statutes published under the commission from the Crown, there is no other than the general title "Provisiones de Merton;" and no more argument can justly be built upon the title prefixed in some editions of the statutes, than upon the marginal notes against its different sections. That statute or provision of Merton runs thus, viz.: "To the King's writ of bastardy, whether any one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered that they would not nor could not make answer to that writ, because it was directly against the common order of the church, and all the bishops instanted the lords that they would consent that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession to inheritance, forasmuch as the church accepteth such as legitimate. And all the earls and barons, with one voice, answered that they would not change the laws of the realm which hitherto had been used and approved." . . .

It therefore appears to be the just conclusion from these premises, that the rule of descent to English land is, that the heir must be born after actual marriage of his father and mother, in order to enable him to inherit; and that this is a rule of a positive inflexible nature, applying to, and inherent in, the land itself, which is the subject of descent, of the same nature and character as that rule which prohibited the descent of land to any but those who were of the whole blood to the last taker, or like the custom of gavelkind or borough-English, which cause the land to descend, in the one case, to all the sons together; in the other, to the younger son alone.

And if such be, as it appears to us to be, the rule of law which governs the descent of land in England, without any exception, either express or implied therein, on the score of the place of birth of the claimant, it remains to be considered whether, by any doctrine of international law, or by the comity of nations, that rule is to be let in by which B., being held to be legitimate in his own country for all purposes, must be considered as the heir-at-law in England.

The broad proposition contended for on the part of the plaintiff in error is, that legitimacy is a personal status to be determined by the law of the country which gives the party birth; and that, when the law of that country has once pronounced him to be legitimate, he is, by the comity of international law, to be considered as legitimate in

every other country also, and for every purpose; and it is then contended that, as by the Scotch law there is a *presumptio juris et de jure*, that, under the circumstances supposed, the parents of B. were actually married to each other before the birth of B., such presumption of the Scotch law, by which his legitimacy is effected, must also be adopted and received to the same extent in the English as in the Scotch courts of justice.

Now, there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom.

But it does not therefore follow, that, with the adoption of the marriage contract, the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated. That the marriage in question was not celebrated in fact until after the birth of B. is to be assumed from the form of the question. Indeed, except on that supposition, there would be no question at all. Does it follow, then, that because the Scotch hold a marriage celebrated between the parents after the birth of a child to be conclusive proof of an actual marriage before, a foreign country, which adopts the marriage as complete and binding as a contract of marriage, must also adopt this consequence? No authority has been cited from any jurist or writer on the subject of the law of nations to that effect, — nothing beyond the general proposition that a party legitimate in one country is to be held legitimate all over the world. Indeed, the ground upon which this conclusion of B.'s legitimacy is made by the Scotch law, is not stated to us, and we have no right to assume any fact not contained in the question which your Lordships have proposed to us. We may, however, observe that, in the course of the argument at your Lordships' bar, the ground has been variously stated, upon which the laws of different countries have arrived at the same conclusion. It was asserted that, by the law of Scotland, the subsequent marriage is not to be taken to be the marriage itself, but only evidence, though conclusive in its nature, of the marriage prior to the birth of B.; that the canon law rests the legitimacy of the son born before such marriage upon a ground totally different, viz., that having been born illegitimate, he is made legitimate, *legitimus*, by the subsequent marriage, by a positive rule of law, on account of the repentance of his parents; whereas, by the Scotch law, a marriage previous to his birth is conclusively presumed, so that he always was legitimate, and his parents had nothing to repent of. Pothier, on the other hand (*Contrat de Marr.*, part. v. ch. 2, art. 2), when he speaks of the effect of a subsequent marriage, in legitimating children born before it, disclaims the authority of the canon law, nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of Troyes,

“Les enfans nés hors mariage De Soluta et Soluta puis que le père et la mère s'épousent l'un l'autre, succèdent et viennent à partage avec les autres enfans si aucuns y' à ;” and then adds, “that it is a common right received throughout the whole kingdom.”

Now it could never be contended by any jurist, that the law of England in respect to the succession of land in England, would be bound to adopt a positive law of succession like that which holds in France, the distinction being so well known between laws that relate to personal status and personal contracts, and those which relate to real and immovable property; for which it is unnecessary to make reference to any other authority than that of Dr. Story, in his admirable Commentaries on the Conflict of Laws. (See sections 430 and following, where all the authorities are brought together). And if such positive law is not upon any principle to be introduced to control the English law of descent, what ground is there for the introduction into the English law of descents, not only of the contract of marriage observed in another country, which is admitted to be adopted, but also of a fiction with respect to the time of the marriage? that is, in effect, of a rule of evidence which the foreign country thinks it right to hold.

But admitting, for the sake of argument, and we are not called upon to give our opinion on that point, that B., legitimate in Scotland, is to be taken to be legitimate all over the world; the question still recurs, whether, for the purpose of constituting an heir to land in England, something more is not necessary to be proved on his part than such legitimacy; and if we are right in the grounds on which we have rested the first point, one other step is necessary, namely, to prove that he was born after an actual marriage between his parents; and if this be so, then, upon the distinction admitted by all the writers on international law, the *lex loci rei sitæ* must prevail, not the law of the place of birth.

My Lords, in the course of the discussion, some stress appears to have been placed on the argument, that if B. had died before A. the intestate, leaving a child, such child might have inherited to A., tracing through his legitimate parent; and then it was asked if the child might inherit, why might not the parent himself inherit? But the answer to that supposed case appears to be, that if the parent be not capable of inheriting himself, he has no heritable blood which he can transmit to his child; so that the child could not, under the assumed facts, have inherited, and the question therefore becomes, in truth, the same with that before us. The case supposed would be governed by the old acknowledged rule of descent: “Qui doit inheriter al père, doit inheriter al fitz.”

My Lords, the two decided cases that have been relied upon in the course of argument, that of *Shedden v. Patrick*, and that of the *Strathmore Peerage*, do not, upon consideration, create any real difficulty. Those cases decide no more than that no one can inherit without hav-

ing the personal status of legitimacy, — a point upon which all agree ; but they are of no force to establish the main point in dispute in this case, viz., that such personal status is sufficient of itself to enable the claimant to succeed as heir to land in England.

Upon the whole, in reporting to your Lordships as the opinion of the judges, "that B. is not entitled to the real property as the heir of A.," I am bound at the same time to state, that although they agree in the result, they are not to be considered as responsible for all the grounds and reasons on which I have endeavored to support and to explain such opinion.

LORD COTTENHAM, Lord Chancellor. My Lords, I was not in your Lordships' house when this case was first argued ; but I was present at the argument when the learned judges were in attendance, and I gave my attention to the opinion expressed by the Lord Chief Justice, and I entirely concur in that opinion. I am extremely satisfied with the ground upon which the judges put it, because they put the question on a ground which avoids the difficulty that seems to surround the task of interfering with those general principles peculiar to the law of England, principles that at first sight seem to be somewhat at variance with the decisions to which the courts have come. Under these circumstances, as my noble and learned friend does not move the judgment, I move judgment for the defendant in error.

*Judgment accordingly.*¹

IN RE ANDROS.

CHANCERY DIVISION. 1883.

[*Reported 24 Chancery Division, 637.*]

WILLIAM ANDROS, who died in January, 1882, by his will dated in August, 1879, gave (*inter alia*) one-third part of his personal estate to trustees "upon trust to pay and divide the same equally between such of his great nephews, the sons of his deceased nephew Thomas

¹ *Acc. Fenton v. Livingston, 3 Macq. 497 ; Lingen v. Lingen, 45 Ala. 410 ; Williams v. Kimball, 35 Fla. 49, 16 So. 783 ; Smith v. Derr, 34 Pa. 167.* Conversely land was held to descend to persons described as heirs in the local statutes, though they were not legitimate by the law governing their status. *Harvey v. Ball, 32 Ind. 98 ; Estate of Oliver, 184 Pa. 306, 39 Atl. 72.* See *Leonard v. Braswell, 99 Ky. 528.*

It has, however, been held in other States, under the statutes of inheritance there in force, that one having a legitimate status (though illegitimate at birth) may inherit land. *Scott v. Key, 11 La. Ann. 232 ; Ross v. Ross, 129 Mass. 243 (semble) ; Miller v. Miller, 91 N. Y. 315.* So, conversely, that one illegitimate by the law governing his status cannot inherit, though by the law of the situs he would be legitimate, *Smith v. Kelly, 23 Miss. 167.* — ED.

Godfrey Andros," as should survive him and attain the age of twenty-five years, in equal shares; but he gave his said trustees absolute discretion to pay to his said great nephews, or either of them, the whole or any portion of the capital of the shares or share to which they or he might be presumptively entitled at any time or times his said trustees might consider it expedient to do so.

Thomas Godfrey Andros was a native of Guernsey, and by the laws of that island a child born before the marriage of his parents becomes legitimate upon their subsequent marriage as fully as if he had been born in wedlock.

The plaintiff was the son of T. G. Andros, and he was born in Guernsey in December, 1860. In January, 1865, T. G. Andros married in Guernsey the plaintiff's mother, he had four children after the marriage, and he died domiciled in Guernsey on the 12th of November, 1875. The plaintiff had attained twenty-one, and the trustees of the will being ready to pay him his due share of the one-third of the testator's residuary personal estate if they could lawfully do so, the question submitted for the opinion of the court was whether the plaintiff ought to be deemed to be a legitimate son of Thomas Godfrey Andros, and as such entitled to share with his children born after wedlock in the testator's bequest.

KAY, J. This will being an English will must of course be construed according to English law. That law requires that all who take under a gift to sons of a named father should be legitimate offspring. It must now be treated as settled that any person legitimate according to the law of the domicile of his father at his birth is legitimate everywhere within the range of international law for the purpose of succeeding to personal property.

The well-known case of *Doe v. Vardill*, 7 Cl. & F. 895; 6 Bing. N. C. 385; 9 Bl. (N. S.) 32, which introduced a distinction in this respect in the case of a person claiming to succeed as heir to real property in England by requiring such a person to establish his legitimacy according to English law — that is, as though the father had been domiciled in England at the time of the birth of the child — treats this as an exceptional case and recognizes that the rule of succession to personal estate is otherwise, and this has been recently more expressly decided by the Court of Appeal in *In re Goodman's Trusts*, 17 Ch. D. 266.¹

If, then, a child of a foreigner legitimate according to the law of his father's domicile, though illegitimate if his father had been a domiciled Englishman, can succeed as next of kin to personal estate in England, why should he not take a bequest of personalty by the description of the son of his father in the will of an English testator? On principle it seems to me very difficult to say why he should not.

However, in *Boyes v. Bedale*, 1 H. & M. 798, the late Lord Hatherley in a considered judgment decided that such a person could not take

¹ *Contra* *Lingen v. Lingen*, 45 Ala. 410. — ED.

under a gift to the children of his father. The will and every term in it, his Lordship held, must be construed according to English law. If in a Canadian will there were a gift of £100, that would mean £100 Canadian currency not £100 sterling. So the testator "must be taken to mean a child in the sense in which the law of England understands the term."

Speaking with all deference, the illustration seems to me inapt and wanting in analogy. If two countries happen to have the same name for their monetary currency no one for a moment could suppose that a testator in one of these using the familiar name of the currency of his own country meant by that the currency of different value of the foreign country which happened to have the same name; but how does it follow from this that a gift to the children of a foreigner means such children only as would be legitimate if he had been a domiciled Englishman? A bequest in an English will to the children of A. means to his legitimate children, but the rule of construction goes no further. The question remains Who are his legitimate children? That certainly is not a question of construction of the will. It is a question of status. By what law is that status to be determined? That is a question of law. Does that comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it. The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended A's legitimate children. If you ask the further question, Did he intend his children who would be legitimate according to English law or his actual legitimate children? How can the rule of construction answer that?

Lord Hatherly considered that the bequest must be read to such children as would be legitimate according to the law of England if their father had been a domiciled Englishman at their birth. But is that according to the English rule of construction that children means legitimate children? Try it thus. Suppose the same rule of construction to prevail in Guernsey, and that in the will of a Guernsey testator there were a bequest to the children of an Englishman. According to *Boyes v. Bedale*, 1 H. & M. 798, children would mean such children as would be legitimate according to the law of Guernsey. By this construction *ante nati* of the English father would share with his children legitimate according to English law, because they would have been legitimate if the father had been domiciled in Guernsey, though they were in fact illegitimate by English, and, of course, by international law.

This would not carry out, but contravene, the rule of construction.

Vice-Chancellor Kindersley, in *In re Wilson's Trusts*, Law Rep. 1 Eq. 247, expressed his readiness to follow *Boyes v. Bedale*. The facts of that case, however, were not the same. A domiciled Englishman had married an Englishwoman. He went to Scotland, and without

having a Scotch domicil he sued for and obtained a Scotch divorce, which was not sufficient to dissolve the English marriage. The woman then married in Scotland a domiciled Scotchman, and had children by him, and the question was whether they could be considered legitimate in England. The decision of Vice-Chancellor Kindersley was supported in the House of Lords (*Shaw v. Gould*, Law Rep. 3 H. L. 55) on the ground that international law did not require the English courts to recognize such a divorce, and therefore the children were not by that law legitimate.

That decision does not apply, because it cannot be denied that the children in this case would be recognized as legitimate, for some purposes at any rate, by every other State in Christendom.

These are the two cases most nearly in point on the one side. On the other there are two decisions of Vice-Chancellor Stuart, *Goodman v. Goodman*, 3 Giff. 643, and *Skottowe v. Young*, Law Rep. 11 Eq. 474. The late Master of the Rolls observes of the former that the point was not there really considered and decided. See *In re Goodman's Trusts*, 14 Ch. D. 619. But according to the report it certainly was argued, and the decision was that *ante nati* born in England while the father was domiciled here could not take under a gift to children, but that an *ante natus* born in Holland when the father was domiciled there might take in conjunction with the *post nati* by the same mother whom he married in that country, thus legitimatizing the *ante natus* there. *Skottowe v. Young* was a question of legacy duty, but the same point was involved.

Besides these two cases there is the analogy which I have referred to derivable from the decisions, showing that a child legitimate by the law of his father's domicil may take as next of kin in a succession to personal estate in England.

But in addition to these considerations there is the opinion of Lords Justices Cotton and James in the case of *In re Goodman's Trusts*, 17 Ch. D. 266. The former says, *Ibid.* 295:—

“In *Boyes v. Bedale*, 1 H. & M. 798, the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named. The Vice-Chancellor held that a child exactly in the same position as Hannah Pieret was not entitled under the bequest. He said that the will, being that of a domiciled Englishman, must be construed according to English law, which, in my opinion, is correct so far as to require that this word ‘children’ shall be construed ‘legitimate children.’ But he held that English law recognized as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in England at the time of their birth, is, in my opinion, erroneous as to children born of parents who at the time of the birth were domiciled in a country by the law of which the children were legitimate.”

Lord Justice James says, 17 Ch. D. 299: “The decision in *Boyes v. Bedale* was on the ground that, in an Englishman's will, the children

of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in England, and made in favor of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction?"

The decision in *In re Goodman's Trusts*, 17 Ch. D. 266, overruled the late Master of the Rolls, and was dissented from by Lord Justice Lush.

This conflict of authority leaves me free to decide this case according to my own opinion, which is in favor of the plaintiff's claim.

I observe that the testator describes the objects of his bounty not merely as the sons of his deceased nephew Thomas Godfrey Andros, but also as his own great nephews; but that, in my opinion, makes no difference. The law of this country by the comity of nations recognizes the plaintiff as legitimate, and therefore he is as much the lawful nephew of the testator as he is the lawful son of J. G. Andros.

The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognized in this country, those children are legitimate whose legitimacy is established by the law of the father's domicil. Thus *ante nati* whose father was domiciled in Guernsey at their birth, and subsequently married the mother so as to make the *ante nati* legitimate by the law of Guernsey, are recognized as legitimate by the law of this country, and can take under such a gift.¹

VAN MATRE v. SANKEY.

SUPREME COURT OF ILLINOIS. 1893.

[Reported 148 Illinois, 536.]

MARY F. VAN MATRE filed her bill in chancery in the Cook County Circuit Court, alleging that she and others named in the bill, including Caroline C. Sankey, were the heirs-at-law of Samuel Sankey, who died intestate in November, 1886, without issue or widow surviving him, and seized of certain lots and lands in said county, of which partition was sought among said collateral heirs of said decedent. The bill also set up that appellant Henry L. Glos and others claimed some interest in certain of the lands under tax deeds which were alleged to be void, and were asked to be removed as clouds upon the title of complainant and her co-heirs.

Caroline C. Sankey answered the bill, denying that others were inter-

¹ *Acc. In re Grey's Trusts*, [1892] 3 Ch. 88. — Ed.

title in fee to the whole, as the cross-bill, alleging that by the court of common pleas of the county of Cook, Illinois, adopted by said Samuel Hant, January, 1879, and that said court finding no widow him surviving. The cross-bill also alleged that the deeds which were a cloud on the title, as amended, certain debts, and the cross-bills, the court prayed of the cross-bill; that the tax deeds alleged were void, and that the cross-bill, of the said Hant, interest and costs, etc., From the decree dismissing the complaint in the cross-bill so much of the decree as ordered, etc., the said Henry L.

of adoption, although valid and, *pro tempore*, of the person owning the real property in Illinois, and as supporting that contention, as well as of the said Oaburn Case the courts of the county of Cook, Illinois, as affecting the question was, whether the parties were given, in proceedings in the county of Cook, Illinois, state. It was held that they must construe the will, as the said Hant, for themselves, and as devised by separate wills. Its situs, and not by the law of the county of Cook, Illinois, the will must be construed in accordance with the construction control its situs. The said Hant, and that the right

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Judgments, 792, *et seq.* The statute under which the adoption proceedings were had, provides that the child shall be decreed to take the name of the adopting parents, "and have all the rights of a child and heir of such adopting parents, and be subject to the duties of such child." The decree, by force of this statute, established, *eo instanti* its rendition, the relation of parent and child, imposed upon the parties the reciprocal duties and obligations of that relation, and impressed upon and invested the child with the rights and qualities of a child and heir-at-law of Samuel Sankey. This we understand to be the construction of the statute by the courts of that State. Wolf's Appeal (Pa.) 13 Atl. 760. The status of appellee having been established under and existing by virtue of the *lex domicilii*, is to be recognized and upheld in every other State, unless such status, or the rights flowing therefrom, are inconsistent with or opposed to the laws and policy of the State where it is sought to be availed of.

This court, in Keegan v. Geraghty, 101 Ill. 26, quoted with approval the language of Mr. Justice Gray in Ross v. Ross, 129 Mass. 243, as follows: "It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy," and the principle announced, with its limitation, was expressly approved. Roth v. Roth, 104 Ill. 348. In the Keegan Case, *supra*, the child, adopted under the laws of Wisconsin, sought in this State to take, not from the adopting parent, but from collaterals and by representation. This court expressly recognized the status established in Wisconsin, so far as it related to the right to inherit from the parent by adoption, because consistent with the laws of this State relating to descent to adopted children, but denied the right to take by representation from collateral kindred of the parent, for the reason that such taking was prohibited by and inconsistent with the laws of this State. Rev. Stat. sect. 1, par. 5, chap. 39. No inconsistency with our laws or their policy exists in this case. The rights claimed under and by virtue of the adoption in Pennsylvania are those, and none other, that would exist upon the creation of the same artificial relation in this State.

We are of opinion, therefore, that upon the death of Samuel Sankey without other children, the estate in Illinois descended to appellee, Caroline C. Sankey, as his child and heir-at-law, and that the court correctly decreed in dismissing the original bill.

*Decree affirmed.*¹

¹ *Acc.* Gray v. Holmes, 57 Kan. 217, 45 Pac. 596; Ross v. Ross, 129 Mass. 243; Melvin v. Martin, 18 B. L. 650, 30 Atl. 467. See Stoltz v. Doering, 112 Ill. 234.—Ed.

SECTION IV.

GUARDIANSHIP OF THE PERSON.

NUGENT v. VETZERA.

CHANCERY. 1866.

[*Reported Law Reports, 2 Equity, 704.*]

MOTION on behalf of the defendant, Albin Vetzera, that an order appointing the plaintiff Mrs. Nugent and her husband, and the Countess Gifford, as guardians of the infant plaintiffs during their respective minorities, might be discharged, and that such guardians might be ordered to deliver up the infants, who were Austrian subjects, to the custody of Signor Vetzera, their guardian duly constituted by the Imperial and Royal (Austrian) Consular Court at Constantinople; and also on behalf of the infant defendants, that an order directing that plaintiffs should be at liberty to serve the bill upon them out of the jurisdiction, might be discharged.

The facts were shortly as follows:—

The father of the infant plaintiffs and defendants, Signore Theodore Baltazzi, was a Greek by birth, but an Austrian subject, and carried on the business of a banker at Constantinople until his death in June, 1860. By his wife, who was an Englishwoman, and a member of the Church of England, he had ten children, all of whom survived him and were still under twenty-four, the age of majority according to the Austrian law. Signor Baltazzi died intestate, and administration of his estate, which was very considerable, was granted to his widow by the Austrian Consular Court at Constantinople, and she, and Etienne Mavrocordato, were also appointed by that tribunal guardians of the persons of the intestate's infant children.

Early in 1863 Madame Baltazzi contracted a second marriage with Mr. Alison, Her Britannic Majesty's envoy in Persia, and about the same time Etienne Mavrocordato resigned his office of guardian, upon which Signor Albin Vetzera (the defendant now moving), the secretary to the Austrian Embassy at Constantinople, was appointed one of the guardians in his place. Upon the death of their mother, Mrs. Alison, in December, 1863, Epaminondas de Baltazzi was appointed guardian of the children in her place. In July, 1865, Epaminondas de Baltazzi resigned his office of guardian, partly (as it was alleged) from differences between himself and Albin Vetzera as to the management of the children and administration of the intestate's property, of which they were joint "curators" or trustees, but principally from his being unable to comply with the direction of the Consular Court ordering him to fix his residence at Vienna for the purpose of having the children educated there.

On the 24th of July, 1865, the resignation of de Baltazzi was accepted, and by a decree of the Austrian Consular Court of the same date, Vetzera was appointed sole guardian of the children, with a direction that they should be brought up in the religion of their father, and sent as soon as possible to Vienna "in order to receive their education in that city, the only mode of awakening and consolidating the sentiments of faithful Austrian subjects."

It appeared that Madame Baltazzi was always most anxious that her children should receive an English education, and, with the consent of her husband, they were all brought up as members of the Church of England. Two of the girls were sent to school in England during his lifetime, and in 1861 the eldest boy was sent over to this country, and in 1862, after the marriage of the eldest daughter to Mr. Nugent, a gentleman living in London, two more boys and two of the girls were brought over from Constantinople to England under the care of Countess Gifford, and were now being educated in this country, spending their holidays with their married sister, Mrs. Nugent.

The state of the family, and the ages and residences of the children at the time of filing the bill (December, 1865) will appear from the following tabular statement:—

Residing in England.

Mrs. Nugent, the plaintiff, who was married in 1862 to Albert Llewellyn Nugent (a nephew of Field Marshal Count Nugent) .	23
Alexandre (now at Eton)	16
Hector (at Rugby)	15
Aristides (preparatory school at Cheam)	14
Eveline { at Mrs. Watson's school in Gloucester Crescent, }	12
Charlotte { Hyde Park }	11

Residing at Constantinople.

Helen (wife of Signor Albin Vetzera)	19
Mary	17
Henry	8
Julia	5

After the resignation of Epaminondas de Baltazzi, Mrs. Nugent petitioned the Consular Court, but without success, for the appointment of herself as guardian over her infant brothers and sisters, and in the meantime Vetzera announced his intention of removing one of the boys and the two girls from England, and sent over a confidential female servant to take care of them during their journey to Constantinople. Mr. and Mrs. Nugent refused to let the children go, and acting upon the circumstance that a portion of the intestate's estate (£160,000) was invested in consols and in India 5 per cents, they had, on the 2d of December, 1865, filed this bill for the purpose of

making the infants wards of court, securing the trust funds in this country for their benefit, and having guardians appointed, and a proper scheme for their maintenance settled by the court.

On the 13th of December, 1865, an order was obtained for service of the bill upon the defendants out of the jurisdiction, viz.: Albin and Helen Vetzera, the three infants, Mary, Henry, and Julia Baltazzi, living with them at Constantinople, and Mr. Gilbertson, who was one of the trustees of Mrs. Nugent's marriage settlement.

On the 19th of December, 1865, an order was obtained appointing Mr. and Mrs. Nugent and the Countess Gifford guardians of the infant plaintiffs, and giving liberty to serve a copy of the order upon the defendant Albin Vetzera at Constantinople.

Against these orders the present motion was made on behalf of the defendant Albin Vetzera.

In the meantime, on the 22d of December, 1865, an order was made by the Austrian Consulate, on the petition of Vetzera, authorizing him to suspend all further payments of the allowance to the infants for the purpose of their education in England, until they should have been put under the control of their guardian, and also of Mrs. Nugent's allowance, until she should have ceased to interfere in the affairs of the guardianship.

Against this order, and that, by which her petition, that she might be appointed guardian, was refused, Mrs. Nugent had appealed to the Supreme Court of Vienna.

In his affidavit filed in support of the present motion, the defendant Vetzera stated that he was dissatisfied with the progress made by Eveline and Charlotte with their schoolmistress, and also that he considered it to be his duty as guardian to obey the directions of the Austrian Consular Court, and remove the infants from England. For that purpose he had made arrangements that Eveline and Charlotte should reside with himself and his wife at Constantinople, and a competent governess for their education at his own house was already engaged. With regard to the boys, he proposed to place one of them (Hector) with a gentleman and his wife, of the highest respectability, residing in Austria, but stated that he had no present intention of removing Alexandre and Aristides from where they now were, though he considered it of the greatest importance that the boys "should have the advantage of an Austrian education, to qualify them hereafter for that position to which, from their rank and fortune, they would as Austrian subjects in Austria naturally aspire."

Evidence was also given as to the jurisdiction over infant Austrian subjects exercised by the Austrian courts, and by them committed to the guardians.

The affidavits on behalf of the plaintiffs in favor of keeping the children in England, need not be stated in detail, as they were directed to the superiority of an English public school education, and English associations, over education at Constantinople, or even at Vienna.

Attention was also called in the affidavits to the strongly expressed and acted upon wish of the mother that the children should be brought up in England.¹

WOOD, V. C. As regards the more important matter in this case, a question of very great importance, but I think really of small difficulty, is raised. Having regard to the principles of international law, and the course that all courts have taken of recognizing the proceedings of the regularly constituted tribunals of all civilized communities, and especially of those in amicable connection with this country, it is impossible for me entirely to disregard the appointment of a guardian by an Austrian court over these children, who are Austrian subjects, and children of an Austrian father, merely because those who preceded Signor Vetzera in his guardianship have taken the course of sending the children over to this country for the purpose of educating them, seeing that he is now desirous of revoking that arrangement. I am now asked in effect to set aside the order of the Austrian court, and declare that this gentleman so appointed cannot recall his wards who have been sent to this country for the purpose of their education. It would be fraught with consequences of very serious difficulty, and contrary to all principles of right and justice, if this court were to hold that when a parent or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this court might be of opinion that an English course of education is better than that adopted in the country to which they belong. I cannot conceive anything more startling than such a notion, which would involve on the other hand this result, that an English ward could not be sent to France for his holidays without the risk of his being kept there and educated in the Roman Catholic religion, with no power to the father or guardian to recall the child. Surely such a state of jurisprudence would put an end to all interchange of friendship between civilized communities. What I have before me is nothing more or less than that case.

Now, it appears to me plain, that I must take these children as remaining in this country only with the sanction of Signor Vetzera, and without any interference on the part of the Austrian court. Then at a proper time he wishes to recall them from England. Of course if there had been no application to this court no one can doubt the course which things would have taken. He being sole guardian, when he thought the children had been long enough at school in England would take them, if he thought fit, from this country and they would be removed.

[His Honor, after stating the filing of the bill and the appointment of guardians in England who wished to retain the children in this country, continued: —]

¹ Arguments of counsel are omitted. — Ed.

This application being made, it is now sought to prevent Signor Vetzera from removing the children so sent to this country for their education, on the plea that this court has appointed guardians here in England (for which the jurisdiction is not to be disputed), and that having so appointed them, the court will do no more than look at what is most for the benefit of the infants.

Lord Bute's Case, 9 H. L. C. 440, is cited for the purpose of showing that I ought, if satisfied that it is more for the interest of the infants that they should remain here than be sent back to their own country, to supersede the authority of the foreign guardian and the authority of the court that has appointed him, which takes care of the education of its own subjects, and directs how it shall be carried into effect. It appears to me that no doctrine of that kind was in any way propounded in Lord Bute's Case, and certainly the other authority referred to, of Dawson v. Jay, 3 D. M. & G. 764 (called the American case), has no bearing upon the subject. Lord Cranworth there puts his decision on the ground that the child turned out to be a British subject, and that he had no authority to send a British subject out of the realm. In Lord Bute's Case the young marquis was a subject of the United Kingdom, and had very large property in England as well as in Scotland, and the question was, between the English and Scotch guardians, to which class the Crown, as *parens patriæ*, having full power to deal with the matter, should assign him. Can that be compared with a case in which the question is, whether I, sitting here as a judge in this country, am to decide whether or not the courts of the Emperor of Austria have rightly decided upon the mode in which they wish their subjects to be educated? The proposition is entirely beyond all reason, and this court would be exceeding very largely the judicious exercise of the powers which every tribunal has in an independent country over those who may be within its control and jurisdiction, if it attempted to form a judgment whether or not it was more expedient that these children, who are Austrian subjects, should be brought up in England rather than in Austria. The case apparently nearest in principle, perhaps, though not, on examination, to be compared with it, is that in which a Roman Catholic parent abandoning his child to Protestant instruction for several years, has sought to change its course of education and bring it back to his own form of religion. There the court would not allow the child's religious principles to be disturbed by changing the course of instruction under which it had so long been allowed to remain, holding that the father had, in effect, abandoned his right of choice. But that is not the case here. I see nothing on the facts to induce me to suppose that either this gentlemen as guardian, or the courts of Austria, in exercise of their rights over their own subjects, have at all abandoned these children, merely because they have allowed them to be educated for some four or five years in this country, where it was thought they could best be educated. To hold otherwise would render it most unwise for any foreign country to send her subjects to this country, as this court might say that the Queen of

England, as *parens patriæ*, can see to the education of children better than the Emperor of Austria, as *parens patriæ* within his own dominions, can. The same authority which we claim here on behalf of the Crown as *parens patriæ*, is claimed by every other independent State, and should not be interfered with except on some grounds which I do not think it necessary to specify, guarding myself, however, against anything like an abdication of the jurisdiction of this court to appoint guardians. With respect to the English guardians of these children I hold that the court has power to appoint them, and I continue those that have been appointed. The case may well happen of foreign children in this country without any one to look after or care for them, or who may require the protection of this court to save them from being robbed and despoiled by those who ought to protect them. These children, on the other hand, seem to have met with nothing but kindness from their relations on all sides, but it may be desirable that, so long as they remain in this country, they should have the protection of guardians living within the jurisdiction. Out of respect to the authority of the Austrian courts, by which this gentlemen has been appointed, I reserve to him, in the order I am about to make, all such power and control as might have been exercised over these children in their own country if they were there, and had not been sent to England for a temporary purpose. Taking that view of the case I have not asked to see the children. I could not be influenced by anything I might hear from them. I assume that they are most anxious to remain here, and not to go back to their own country, but I have no right to deprive the guardian appointed by the foreign court over them of the control which he has lawfully and properly acquired, has never relinquished and never abandoned, and under which authority alone they have remained here, and been maintained and supported here.

As regards the service of the bill on those children who are out of the jurisdiction, I must take it on the present bill, as no demurrer has been filed, that the order has been properly made. It is alleged that all the debts, funeral, and testamentary expenses of the testator have been paid, that part of his property is invested in this country, and that by the law of Austria these funds are divisible in given shares among the plaintiffs, and other children abroad who are interested in them, and therefore it has been thought right that they should be served with a copy of the bill, in order that they may come in in respect of their interest in the stock. I should be the more indisposed to disturb that order, as it is not asked to grant any proceeding against them, but that they should come in upon their common interest with the plaintiffs. I think, therefore, as things stand on the present state of the record, that I am not at liberty to discharge that order, and it follows, as a mere matter of course, that I ought to appoint a guardian *ad litem* for the purpose of answering.¹

¹ Compare *Dawson v. Jay*, 3 D. M. & G. 764; *Johnstone v. Beattie*, 10 Cl. & F. 150; *Stuart v. Marquis of Bute*, 9 H. L. C. 440. — Ed.

CHAPTER XII.

PROPERTY.

WATERS v. BARTON.

SUPREME COURT OF TENNESSEE. 1860.

[*Reported 1 Coldwell, 450.*]

McKINNEY, J. The complainant, Elizabeth, is the only child of David A. Barton, who died in Texas, in December, 1844, leaving the complainant, his only distributee, then an infant of about eleven months old.

This bill was filed originally, in the name of her next friend, to recover two slaves, named Henry and Mack, claimed to have been the property of said D. A. Barton, who died intestate.

The allegations and proof, in regard to the ownership of said slaves, by David A. Barton, is contradictory. For the complainants, it is alleged that Joshua Barton, the father of David A., made a parol gift of the slaves to him. The defendants deny the gift, and allege that the slaves were merely loaned by the father to his son, for the period of two years, at the expiration of which time they were to be returned.

The proof shows, that in September, 1842, the intestate, David A., whose residence was in Texas, was on a visit to his father's family, who resided in Cannon County, Tennessee, and that, about to return home, Joshua Barton, his father, placed said two slaves in his possession, to take with him to Texas; that he did take them with him to his home, in Texas, where he arrived about the 15th of October, 1842; and that he retained possession of the slaves, and claimed them as his own property, from that date until his death, which happened on the 20th December, 1844, being a period of more than two years; and that after his death, they came into the possession of the administrator of his estate, who delivered them into the custody of the guardian of the complainant, with whom they remained until November, 1845, when by the procurement of Joshua Barton, they were enticed away and brought to Tennessee, and taken possession of by Joshua Barton, who claimed them as his property; and who, shortly afterwards, delivered the slave, Mack, into the possession of his son-in-law, the defendant, Ramsey, who still has him in his possession; and at a

later period, he disposed of Henry, to his son, the defendant, William, who still retains him.

Joshua Barton died in the spring of 1858; the defendant, William, is the personal representative of his estate, and the other defendants are the legatees and devisees under his will.

We do not deem it necessary to comment upon the conflicting testimony, in detail, with the view of sustaining our conclusion as to its effect. Suffice it to say, that upon a review of all the evidence, and more especially the declarations of Joshua Barton, as proved by Stokes and Farmer, at the time the slaves were brought back from Texas, in November, 1845, the preponderance of the proof, in our opinion, is, that the transaction was a gift, and not a loan, of the slaves, by Joshua Barton, to his son, David A.

This brings us to the question of law, arising upon the facts stated; namely: Whether or not, under the Statute of Limitations of Texas, David A. Barton acquired such a title to the slaves as will entitle the complainants, suing in his right, to recover them in the courts of this State.

By the Statute of Texas, suit must be commenced, in a case like this present, "within two years, next after the cause of such action, or suit, and not after." See Hartley's Dig., Art. 2377; and this statute "applies no less to foreign than to domestic claims." *Ib.*, Art. 2398.

In the construction of this statute, it has been declared by the Supreme Court of that State, that its effect is, not only to bar the rights of action of the former owner, but also to extinguish his right; and to vest the right of property absolutely in the adverse possession, so that if, after the bar had been completed, the former owner should regain the possession, the possessor might maintain an action against him for the recovery of the property. See 9 Tex. Rep. 123.

For the defendants, it is insisted, that, inasmuch as by the statute of this State, where the suit is brought, an adverse possession of three years is required to give title, under a void *parol* gift of slaves, our own law, and not that of Texas, must govern the decision of the case.

The counsel on both sides refer to Story's Conflict of Laws, § 582; but they differ in their understanding of the import of that authority.

The counsel for the defendants admit that if both parties had been resident within the jurisdiction of Texas, during the whole period prescribed by the law of that State, to complete the bar, the title thus acquired by the possessor might be set up by the complainants, in our courts, in the present case, and a recovery of the slaves be effected by force thereof.

But, forasmuch as Joshua Barton was a resident of Tennessee, and not subject to the jurisdiction or laws of Texas, during the period the slaves were in adverse possession of David A. Barton, in that State, it is denied that any such effect can be predicated of the statute of that State. Mr. Story put this case: Suppose personal property is adversely held in a State, for a period beyond that prescribed by the laws of that

State; and after that period has elapsed, the possessor should remove into another State, which has a longer period of prescription, or is without any prescription, could the original owner assert a title there against the possessor, whose title, by the local law, and the lapse of time, had become final and conclusive before the removal? It has certainly been thought, says the author, that, in such a case, the title of the possessor cannot be impugned. See section 582 and cases referred to in note 2.

The case supposed above, as we understand the author, is, in principle, precisely the present case. Every sovereignty possesses the undoubted power to regulate the rights of property situate within its own jurisdiction.

It may limit all rights of action to certain prescribed periods, and may ordain that, after the expiration of the periods thus prescribed, not only the right of action, but the claim or title likewise, shall be extinguished.

And if a positive title to property be then acquired and perfected by the local law of the place, where situate at the time, upon what sound principle can it be maintained that such title can be effected or defeated by the removal of the property to another country, by the possessor, or by its removal by another, without his consent?

In such a case, can it be material whether or not the former owner was resident within the jurisdiction, by whose local law the possessor had become vested with an absolute title to the property? If it be said that the former owner, by residing within the jurisdiction, during the period prescribed, voluntarily subjected himself to the operation of the local laws of the place, and therefore cannot complain that his right is taken away by those laws, as the result of his own laches, may it not be said with quite as much reason, and force of argument, that, by knowingly suffering his property to be taken, and to remain within the jurisdiction, during the period prescribed by the local law, he thereby voluntarily subjected his property and rights to the operation of such local laws?

In the latter case, as much as in the former, the loss of his right is the result of his own laches.

Our conclusion, therefore, is, that under the law of Texas, the title of Joshua Barton — though not a resident of that State — was extinguished, and the title perfected in David A. Barton; and that the title thus acquired may be set up by the complainants, in the courts of this State, against those claiming the slaves, by the subsequent disposition of them made by Joshua Barton.

*Decree affirmed.*¹

¹ *Acc. Shelby v. Guy*, 11 Wheat. 361; *Rabun v. Rabun*, 15 La. Ann. 471; *Sessions v. Little*, 9 N. H. 271; *Sleeper v. Pa. R. R.*, 100 Pa. 259. — Ed.

EDGERLY v. BUSH.

COURT OF APPEALS, NEW YORK. 1880.

[Reported 81 *New York*, 199.]

THIS action was brought for the alleged conversion of a span of horses.

The facts, as found by the referee, are as follows :—

One Stephen Baker was born in Lower Canada and resided there till 1873. In that year he went to Moriah, in New York, engaged there in business and resided there. While a resident of Moriah he executed to the plaintiff, a resident also of Moriah, on the 9th day of March, 1875, a chattel mortgage on property including the span of horses in question. This mortgage was duly filed March 10, 1875. The sum was payable in monthly instalments, the first payment to be made June 1, 1875. The mortgage contained a clause that in case of non-payment, or in case the mortgagor or any other person should remove, secrete, or dispose of the property, or if the mortgagee deemed it necessary, he might take possession, otherwise the property was to remain in the mortgagor's possession until the time for the first payment. No part of the sum secured has ever been paid. On the 10th of May, 1875, Baker returned to Lower Canada, taking the property with him, and there he has resided ever since. In November, 1875, at St. Jean Chrysostom, in Lower Canada, one Francis De Lisle, of that place, a regular trader, dealing in horses, sold the horses in question to one Bromley, a resident of Plattsburgh, in this State. Bromley made the purchase in good faith and in ignorance of the plaintiff's claim. The horses were in De Lisle's possession at the time and were at once delivered to Bromley and immediately brought by him to Plattsburgh. It does not appear how the horses came into the possession of De Lisle. On the 10th of December, 1875, Bromley learned that the plaintiff claimed to have a mortgage on the horses. To prevent their seizure, by the plaintiff, he immediately removed them to Canada for the purpose of trading back with De Lisle. On the 13th of December, 1875, in Canada, Bromley sold the horses to the defendant. At that time the defendant was a resident of this State. The horses in question remained in Canada, and since then they had not been brought into this State up to the time when this action was commenced. The defendant was informed by Bromley that he had run the horses into Canada to avoid a claim or seizure under a mortgage. Plaintiff made a demand for the horses but defendant refused to deliver. Plaintiff did not reimburse, or offer to reimburse to defendant, the amount paid by him or by Bromley for the horses. Under the laws of Lower Canada, if an article of personal property, lost or stolen, be sold in a fair or market, or at a public sale, or purchased from a trader dealing in similar articles, the owner can-

not reclaim it without reimbursing to the purchaser the price paid by him.¹

FOLGER, C. J. This is an action for the conversion of chattels. It is clear that if the plaintiff had the title to them, or the right to take immediate possession of them, the defendant exerted such dominion over them as was in law a conversion of them. It is also clear that the plaintiff had the title to the property by the laws of this State, and the right to the immediate possession of it.

The defendant must make his defence, if he may at all, upon a title got by Bromley from De Lisle, to which he has succeeded. De Lisle was a resident of Canada, and a trader dealing in articles like the property in contest, and had actual possession of this property there as the proprietor of it. Bromley bought it of him in good faith, gave value for it, and had not actual notice of the plaintiff's right to it. The plaintiff has never reimbursed to Bromley or to the defendant the price paid for it by Bromley, nor has he offered so to do.

We think that these facts make a title in Bromley that the law of Lower Canada would uphold in that jurisdiction. We deem it unnecessary to go into the detail of the interpretation. The question remaining is, which law is to prevail in determining this contest — that of Lower Canada, or that of this State?

We take note that the plaintiff, and Baker from whom the plaintiff got title, were residents of this State when the transfer was made between them; that it was a transfer of property which was then here, whence it was taken without the consent of the plaintiff; that the transfer was made by mutual consent, and was executed and valid here; that the consideration for the transfer existed and passed here; that the plaintiff and defendant were and are residents of this State; and that the forum in which they stand is here. Thus the law of the domicile, and the law of the then situs of the property, and the law of the forum in which the remedy is sought, all concur to sustain the right of the plaintiff. The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him. By that law, as it exists in this case, the plaintiff became the owner of this property before it was taken beyond its operation. By that law, too, an owner of property may not be divested of it without his consent, or by due process of law; plainly not by a dealing with it by others without his knowledge, assent, or procurement. Still, another State may make provision by statute in respect to personal property actually within its jurisdiction. Though a transfer of personal property, valid by the law of the domicile, is valid everywhere as a general principle, there is to be excepted that territory in which it is situated and where a different law has been set up, when it is necessary for the purpose of justice that the actual situs of the thing be examined. *Green v. Van Buskirk*, 7 Wall. 189. Yet the statutes of that land have no extraterritorial force *proprio vigore*, though often permitted

¹ Arguments of counsel are omitted. — Ed.

by comity to operate in another State for the promotion of justice, where neither the State nor its citizens will suffer any inconvenience from the application of them. The exercise of comity in admitting or restraining the application of the laws of another country must rest in sound judicial discretion, dictated by the circumstances of the case. Per Parker, Ch. J., *Blanchard v. Russell*, 13 Mass. 6. It is plain that on no principle applicable to this case could the sale of the plaintiff's property by another having no authority from him, to his wrong indeed, be upheld, save that it was authorized by the statute of Lower Canada. So that the question is one entirely of the comity to be shown by the courts of this State to the enactments of another country. Those statutes not only enact the rule of market-overt as it prevails in general in England, but carry it further, and make, as in the city of London, every sale by a trader dealing in like articles as good as a sale at market-overt.

That rule does not obtain in this State. It has not been our policy to establish it. Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title. It would be to the contravention of that policy, and to the inconvenience of our citizens, if we should give effect to the statutes of Lower Canada, to the divesting of titles to movables lawfully acquired and held by our general and statute law, without the assent or intervention, and against the will of the owner by our law. Notions of property are slight, when a *bona fide* purchase of stolen goods gives a good title against the original owner. Per Kent, Ch. J., *Wheelwright v. Depeyster*, 1 Johns. 470. We are not required to show comity to that extent, especially as it is to our citizens alone that we are administering justice.

There are judgments to the end that the law of the situs of the movable property will determine who is entitled to it, and the matter of comity is not taken into account. A notable one is *Cammell v. Sewell*, in the Exchequer Chamber, 5 H. & N. 728. But there the property had not been in England until after the sale in Norway, and had never been in the possession of the English owners. We doubt whether, in a case like this, where, after a title to property has been acquired by the law of the domicile of the vendor, and of the situs of the thing, and of the forum in which the parties stand, in a contest between citizens of the State of that forum, it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another State, and a sale of it there under different laws. There are decisions that it has not, however. See *Taylor v. Boardman*, 25 Vt. 581; *Martin v. Hill*, 12 Barb. 631; *French v. Hall*, 9 N. H. 137; *Langworthy v. Little*, 12 Cush. 109. It is sought to distinguish these cases from that in hand; but they went upon a principle that is not inapplicable here. In them, as here, a right to movable property had been acquired in one State in a mode efficient thereto by its laws. The property had been taken into another State where that mode was not sufficient by its law to create a right. But the right acquired by that

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CHAPTER XIII.

INHERITANCE.

CAMPBELL v. TOUSEY.

SUPREME COURT, NEW YORK. 1827.

[Reported 7 Cowen, 64.]

ASSUMPSIT for money lent to the testator of the defendant. Pleas: (1) *Non assumpsit*; (2) *Ne unques executor*; (5) *No assets*. The plaintiff on the trial proved his claim to \$94.42, and that the defendant's testator resided and died in Pennsylvania in 1823. He also proved assets to about \$700, which the defendant had received in Pennsylvania and brought from that State to this; and that he had received a certain amount in this State. The defendant proved that he was appointed executor by the will of Booth, and had taken out letters testamentary in Pennsylvania. The judge charged the jury that the defendant was liable as executor for all the assets he still retained in his hands, or had expended or disposed of here, unless in the due course of administration, whether they were received here or brought from Pennsylvania. That his appointment as executor in that State would not, *per se*, protect him; but he must show also that the assets received by him there and here had been disposed of under that appointment, or in the payment of Booth's debts in this State. Having failed to do either, he was liable as executor, *de son tort*, to the amount of the plaintiff's claim, if the assets in his hands amounted to so much. Verdict for the plaintiff for \$94.42.¹

SUTHERLAND, J. The testator resided and died in Pennsylvania, and there the will was proved. The defendant received assets of the estate in Pennsylvania, and brought them with him into this State. He also in this State received debts due to the testator to a considerable amount. The judge charged the jury that the defendant was liable for all the assets which he still retained in his hands, or which he had expended or disposed of in this State, unless in the due course of administration, whether they were received in this State or originally received in Pennsylvania and brought from there here. That the fact

¹ The statement of facts is slightly condensed. Arguments of counsel and part of the opinion are omitted. — ED.

of his having been appointed executor in Pennsylvania would not of itself protect him here; but that it was incumbent on him to show that the assets which he had received in Pennsylvania and brought into this State, as well as those which he had received here, had been disposed of in a due course of administration in Pennsylvania, or in the payment of the debts of the testator in this State. That having failed to do either, he was liable as executor *de son tort* to the amount of those assets.

We see no error in this charge of the judge. If a foreign executor is liable to be sued here, of which we apprehend there can be no question, he must, from the very nature of the case, *prima facie*, be responsible for the assets which are shown to have been in his possession within this State, no matter where they may have been received. And in order to discharge himself from that responsibility, he must show that those assets have been applied in a due course of administration to the payment of the debts of the testator. It is the only way in which an executor, under such circumstances, can be reached. He cannot be compelled to account here, even in relation to the assets received in this State; for having taken no letters of administration here, he is not amenable in that way to any of our courts. He cannot be reached in Pennsylvania, because both his person and the assets are beyond its jurisdiction; and if he is not liable when sued here for the assets received there, he never can be compelled to apply them to the debts of his testator. . . .

The defendant was clearly an executor *de son tort*, and the action was properly brought against him as executor generally. Com. Dig. Administrator, C. 1, 2, 3; Toller's Ex., 17, 369.

It is well settled that if an executor *de son tort* plead *ne unques executor*, as was done in this case, and it be found against him, he shall be charged as any other executor, *de bonis propriis*. Toller, 369.

The motion for a new trial must be denied.

*New trial denied.*¹

JUDY v. KELLEY.

SUPREME COURT, ILLINOIS. 1849.

[Reported 11 Illinois, 211.]

TREAT, C. J.² This is an action of debt, on a judgment recovered in the State of Ohio by Kelley, against the administrators of William Allington. It appears from the record of the proceedings in Ohio that

¹ Statute having done away with executors *de son tort*, it was held that a foreign executor found in New York with assets could not be sued. *Field v. Gibson*, 20 Hun, 274. — Ed.

² Part of the opinion, discussing other questions, is omitted. — Ed.

the suit was there brought against Allington in his lifetime, and service of process had on him. At a succeeding term, the plaintiff suggested the death of Allington, and obtained leave to revive the suit, against his personal representatives. At a subsequent term, the present plaintiffs in error entered their appearance, and pleaded to the action as administrators of Allington; and a trial of the cause resulted in the judgment now the subject of controversy. The presumption from that record is, that the plaintiffs in error obtained letters of administration on the estate of Allington in Ohio. To repel this presumption, the second plea alleges that they were appointed administrators in this State, and that administration was never granted them elsewhere. This presents the question whether a judgment recovered in another State against an administrator appointed in this State can be here enforced against the estate. A grant of administration in one country does not confer on an administrator any title to the property of the intestate situated in another country. He has no authority over, nor is he responsible for any effects of, the estate that may be beyond the jurisdiction. In administering the estate, he acts only in reference to the effects within the jurisdiction, and the debts that may there be presented against the estate. In his official capacity, he can neither sue nor be sued out of the country from which he derives his authority, and to which he is alone amenable. If he wishes to reach property, or collect debts belonging to the estate in a foreign country, he must there obtain letters of administration, and give such security and become subject to such regulations as its laws may prescribe. So, if a creditor wishes to bring a suit in order to satisfy his debt out of property in another jurisdiction, administration must there be first obtained. See Story's Conflict of Laws, § 513, and the numerous authorities there cited. There are a few cases in this country to the effect that a foreign executor may be sued in another jurisdiction, and be there made liable to the extent of the assets he may have with him; but the cases go no farther than to sustain the action for the purpose of subjecting such assets to the payment of the particular debt. *Campbell v. Tousey*, 7 Cow. 64; *Swearingen's Ex'rs v. Pendleton's Ex'rs*, 4 Serg. & R. 389; *Evans v. Tatem*, 9 Serg. & R. 252; *Bryan v. McGee*, 2 Wash. C. C. R. 337. It may be doubted whether these decisions can be supported on principle or authority; but conceding their correctness, they have no direct bearing on this case. The attempt here is to enforce against an estate a judgment rendered in Ohio against administrators appointed in this State. It is clear that the State of Ohio could not rightfully extend her jurisdiction over the plaintiffs in error, in their official character, while within her limits, further than to compel them to account for such assets as they might there have. The plaintiffs in error derived their authority from this State, and they are to be made responsible here only for their acts. That State may grant letters of administration on the estate, and in that way have the effects found within her territory administered; but she cannot, by proceed-

ings in her own courts, reach the assets in this State, or establish claims against the estate that will here be enforced. The debts against the estate are to be adjusted, and the effects belonging to it distributed, according to our own laws.

But it is insisted that the plaintiffs in error, by entering their appearance to the action in Ohio, submitted themselves to the jurisdiction of the court, and cannot now question its authority to pronounce the judgment. This position would be correct if the proceedings there had been against them personally; but as respects them in their representative capacity, we think the effect is otherwise. The grant of administration in this State gave them no control over the estate in Ohio. It did not confer on them any authority to appear and defend the action; any power to go into another jurisdiction, and there permit claims to be adjudicated against the estate. Their authority is limited, and when they exceed it their acts will not bind the estate. The appearance being wholly unauthorized by our laws, the judgment that resulted from it is not binding on the estate. If binding here, for any purpose, it is against the plaintiffs in error personally. If the judgment had been obtained against an administrator duly appointed in Ohio, the record would not be evidence of indebtedness, in an action against the administrators, in this State. "Where administrations are granted to different persons in different States, they are so far regarded as independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter, in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator." Story's Conflict of Laws, § 522.

We are of the opinion that the judgment, if the allegations of the plea are true, cannot be here enforced against the estate. The demand against the intestate has not been adjusted in pursuance of our laws, but in defiance of them. If the creditor wishes to secure any share of the assets in this State, he must sue on his original cause of action. This conclusion is not in conflict with the case of *Davis v. Connelly's Ex'rs*, 4 B. Mon. 136. That was an action brought in Kentucky against executors appointed in that State, on a judgment obtained against them in Ohio. The executors pleaded that they had never administered in Ohio; and the plaintiff replied that the defendants, acting as executors and professing to be such, entered their appearance in the original action, and thereby became executors *de son tort*, and are estopped to deny that they were executors in Ohio. The court sustained the replication, and decided that the defendants were chargeable as executors in their own wrong. In this case the plaintiffs in error are not sued as executors *de son tort*; but the object of the suit is to enforce the judgment against the estate, and satisfy it out of the assets. . . .

*Judgment reversed.*¹

¹ In most jurisdictions it is held that a foreign executor or administrator cannot be sued as such under any circumstances, even if he resides in the State or is found there

JOHNSON v. WALLIS.

COURT OF APPEALS, NEW YORK. 1889.

[Reported 112 *New York*, 230.]

FINCH, J.¹ This is an action in equity to compel the specific performance by the vendors of a contract to sell and assign a judgment recovered by John McAnerney and others, in the Supreme Court of this State, against a corporation known as the Hudson River Iron Company. The judgment was assigned to one Alexander H. Wallis, who was a resident of New Jersey, and died leaving a last will and testament, which has been duly proved in that State, and by which the defendants were appointed executors. They have qualified, and entered upon the performance of their trust. They thereafter made a written contract with one Jacob Russell, all whose rights have passed to the present plaintiff, to sell and assign to him such judgment for a price to be fixed as follows. The judgment was a lien, or supposed to be a lien, upon certain lands under the waters of the Hudson River, near Poughkeepsie, in this State, and had no value beyond

with assets. *Caldwell v. Harding*, 5 Blatch. 501; *Security Ins. Co. v. Taylor*, 2 Biss. 446; *Mellus v. Thompson*, 1 Cliff. 125; *Hedenberg v. Hedenberg*, 46 Conn. 30; *Jackson v. Johnson*, 34 Ga. 511; *Strauss v. Phillips*, 189 Ill. 1, 59 N. E. 560; *Mason v. Nutt*, 19 La. Ann. 41; *Campbell v. Sheldon*, 13 Pick. 8; *Boyd v. Lambeth*, 24 Miss. 433; *Durie v. Blauvelt*, 49 N. J. L. 114; *Ferguson v. Harrison*, 29 N. Y. Misc. 380, 58 N. Y. Supp. 850; *Sparks v. White*, 7 Humph. 86; *Dorsay v. Connell*, 22 N. B. 564. And this is true, even though by statute a foreign representative may sue. *Fairchild v. Hagel*, 54 Ark. 61; *Sloan v. Sloan*, 21 Fla. 589. And even though the administrator consents to be sued in the foreign State. *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095; *Flandrow v. Hammond*, 13 App. Div. 325, 43 N. Y. Supp. 143. It is therefore no *devastavit* for an administrator, when sued in a foreign State, to suffer default. *Davis v. Smith*, 5 Ga. 274.

In a few States, however, a foreign representative may under some circumstances be sued as such. Thus it is sometimes held that an administrator who has come to reside within a foreign State may be sued there. *Colbert v. Daniel*, 32 Ala. 314; *Manion v. Titworth*, 18 B. Mon. 582; *Baker v. Smith*, 3 Met. (Ky.) 284. In other States it is held that if an administrator is found in a foreign State having assets, he may be sued there. *Laughlin v. Solomon*, 180 Pa. 181, 36 Atl. 704; *Tunstall v. Pollard*, 11 Leigh, 1; *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063. And a few cases appear to hold that suit may be brought against any foreign administrator upon whom process may be served. *Evans v. Tatem*, 9 S. & R. 252; *Armstrong v. Newey*, 17 Vict. L. R. 734. It is sometimes held that suit may be brought against a foreign representative if all parties in interest consent. *Newark Sav. Inst. v. Jones*, 35 N. J. Eq. 406; *Ellis v. Northwestern Mut. L. Ins. Co.*, 100 Tenn. 177, 43 S. W. 766.

Where a foreign executor or administrator holds adversely within the State assets of the estate, he may be made to account in equity as constructive trustee. *Clopton v. Booker*, 27 Ark. 482; *Johnson v. Jackson*, 56 Ga. 326; *Patton v. Overton*, 8 Humph. 92.—Ed.

¹ Part of the opinion, discussing the correctness of the arbitrators' valuation, is omitted.—Ed.

such lien. Arbitrators were chosen to fix the value of one acre of the upland, and that value, multiplied by the number of acres subject to the lien, was to be the purchase-price of the judgment. That value was ascertained, the price tendered, and a deed duly demanded, which was refused, and thereupon this action was brought. The plaintiff had judgment which the General Term affirmed, and the defendants appealed to this court.

They rely mainly upon the proposition that as foreign executors they could not sue or be sued in this State, and acquire all their rights from and owe their responsibilities to another jurisdiction. That is the general rule, but in this State at least is confined to claims and liabilities resting wholly upon the representative character. In *Lawrence v. Lawrence* (3 Barb. Ch. 74), the rule was declared to be applicable only to suits brought upon debts due to the testator in his lifetime or based upon some transaction with him, and does not prevent a foreign executor from suing in our courts upon a contract made with him as such executor. Of course where he can sue upon such a contract he may be sued upon it. The remedy must run to each party or neither. In the present case the action is not founded upon any transaction with the deceased but upon a contract which the defendants themselves made. By force of the will and their appointment they became owners of the judgment. Their title, although acquired under the foreign law, was good. In *Peterson v. Chemical Bank* (32 N. Y. 21) the foreign executor sold an obligation of the estate and his assignee sued upon it. The action was sustained on the ground that the title of the foreign executor was good and he could transfer it, and while he could not have sued upon it his assignee was not prevented. In this case, therefore, the defendants were owners of the judgment and could lawfully contract for its sale. Having done so they were liable upon that contract, which could be enforced against them because they made it, and it did not derive its existence from any act or dealing of their testator. We agree, therefore, with the courts below that the action could be maintained. . . .

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

TALMAGE v. CHAPEL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1819.

[Reported 16 Massachusetts, 71.]

THE plaintiff declares as administrator of the estate of George Clinton, in debt upon a judgment recovered by him in his said capacity

¹ But see *Marrett v. Babb* (Ky.), 15 S. W. 4, where it was held that a foreign executor could not enforce specific performance of a contract made by him on behalf of the estate.

against the defendants, in the Court of Common Pleas for the county of Oneida, in the State of New York.

The defendants plead in bar, that the parties, at the time of rendering the said judgment, were all inhabitants of the State of New York, and that the plaintiff was appointed administrator in that State, and has not been so appointed within this commonwealth. To which the plaintiff demurred, and the defendants joined in demurrer.¹

CURIA. We think the plea in bar bad. The case of *Goodwin v. Jones* (5 Mass. 514), cited by the counsel for the defendants, does not apply. The action there was brought for money due to the intestate on a contract made with him; here the action is on a judgment already recovered by the plaintiff, and it might have been brought by him in his own name, and not as administrator. For the debt was due to him, he being answerable for it to the estate of the intestate; and it ought to be considered as so brought, his style of administrator being merely descriptive, and not being essential to his right to recover. It is important to the purposes of justice that it should be so; for an administrator appointed here could not maintain an action upon this judgment, not being privy to it. Nor could he maintain an action on the original contract; for the defendants might plead in bar the judgment recovered against them in New York. The debt sued for is in truth due to the plaintiff in his personal capacity. For he makes himself accountable for it by bringing his action; and he may well declare that the debt is due to himself. There are many cases which show that, where the debt becomes due after the death of the intestate, the administrator may sue for it in his own name; some of which have been cited by the plaintiff's counsel.

Defendants' plea bad.²

JOHNSON v. POWERS.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 139 *United States*, 156.]

GRAY, J. This is a bill in equity, filed in the Circuit Court of the United States for the Northern District of New York, by George K.

¹ Arguments of counsel are omitted. — ED.

² *Acc. In re Macnichol*, L. R. 19 Eq. 81; *Newberry v. Robinson*, 36 Fed. 841; *Lewis v. Adams*, 70 Cal. 408, 11 Pac. 833; *Barton v. Higgins*, 41 Md. 539; *Rucks v. Taylor*, 49 Miss. 552 (*semble*); *Tittman v. Thornton*, 107 Mo. 500, 17 S. W. 979. *Contra* *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125.

So an administrator *de bonis non* may sue his predecessor in a foreign State for the balance found by his own court to be due from him. *Moore v. Fields*, 42 Pa. 467.

Similarly, where an administrator is sued and gets judgment against the plaintiff for costs, he may sue upon the judgment in another State. *Green v. Heritage*, 63 N. J. L. 455, 43 Atl. 698. — ED.

Johnson, a citizen of Michigan, in behalf of himself and of all other persons interested in the administration of the assets of Nelson P. Stewart, late of Detroit in the county of Wayne and State of Michigan, against several persons, citizens of New York, alleged to hold real estate in New York under conveyances made by Stewart in fraud of his creditors.

The bill is founded upon the jurisdiction in equity of the Circuit Court of the United States, independent of statutes or practice in any State, to administer, as between citizens of different States, any deceased person's assets within its jurisdiction. *Payne v. Hook*, 7 Wall. 425; *Kennedy v. Creswell*, 101 U. S. 641.

At the threshold of the case, we are met by the question whether the plaintiff shows such an interest in Stewart's estate as to be entitled to invoke the exercise of this jurisdiction.

He seeks to maintain his bill, both as administrator and as a creditor, in behalf of himself and all other creditors of Stewart.

The only evidence that he was either administrator or creditor is a duly certified copy of a record of the probate court of the county of Wayne and State of Michigan, showing his appointment by that court as administrator of Stewart's estate; the subsequent appointment by that court, pursuant to the statutes of Michigan, of commissioners to receive, examine, and adjust all claims of creditors against the estate; and the report of those commissioners, allowing several claims, including one to this plaintiff, "George K. Johnson, for judgments against claimant in Wayne Circuit Court as endorser," and naming him as administrator as the party objecting to the allowance of all the claims.

The plaintiff certainly cannot maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect; because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that State, and cannot authorize him to maintain any suit in the courts, either State or national, held in any other State. *Stacy v. Thrasher*, 6 How. 44, 58; *Noonan v. Bradley*, 9 Wall. 394.¹

¹ The foreign representative of a deceased creditor (whether executor or administrator) cannot sue on the claim of the deceased. *Tourton v. Flower*, 3 P. Wms. 369; *Allen v. Fairbanks*, 36 Fed. 402; *Lewis v. Adams* (Cal.), 8 Pac. 619; *Hobart v. Turnpike Co.*, 15 Conn. 145; *Naylor v. Moody*, 2 Blackf. 247; *Gregory v. McCormick*, 120 Mo. 657, 25 S. W. 565 (*semble*); *Bufs v. Price*, C. & N. 68; *Chapman v. Fish*, 8 Hill, 554; *Graeme v. Harris*, 1 Dall. 456; *Dodge v. Wetmore*, Brayt. 92; *Dickinson v. M'Craw*, 4 Rand. 158. Thus an administrator appointed in Maryland before the cession of the District of Columbia to the United States cannot sue in the District after cession. *Fenwick v. Sears*, 1 Cr. 259. If a foreign administrator sues in Massachusetts and is allowed to recover judgment, which is satisfied, suit by a Massachusetts administrator, subsequently appointed, is not barred. *Pond v. Makepeace*, 2 Met. 114.

So a foreign executor or administrator cannot bring a bill of revivor in a suit begun by the deceased before his death. *Barclift v. Treece*, 77 Ala. 528; *Greer v. Ferguson*,

The question remains whether, as against these defendants, the plaintiff has proved himself to be a creditor of Stewart. The only evidence on this point, as already observed, is the record of the proceedings before commissioners appointed by the Probate Court in Michigan. It becomes necessary therefore to consider the nature and the effect of those proceedings.

They were had under the provisions of the General Statutes of Michigan (2 Howell's Statutes, §§ 5888-5906), "the general idea" of which as stated by Judge Cooley, "is that all claims against the estates of deceased persons shall be duly proved before commissioners appointed to hear them, or before the Probate Court when no commissioners are appointed. The commissioners act judicially in the allowance of claims, and the administrator cannot bind the estate by admitting their correctness, but must leave them to be proved in the usual mode." *Clark v. Davis*, 32 Mich. 154, 157. The commissioners, when once appointed, become a special tribunal, which, for most purposes, is independent of the Probate Court, and from which either party may appeal to the Circuit Court of the county; and, as against an adverse claimant, the administrator, general or special, represents the estate, both before the commissioners and upon the appeal. 2 Howell's Statutes, §§ 5907-5917; *Lothrop v. Conely*, 39 Mich. 757. The decision of the commissioners, or of the Circuit Court on appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. *La Roe v. Freeland*, 8 Mich. 530. But, as between the parties to the controversy, and as to the payment of the claim out of the estate in the control of the Probate Court, it has the effect of a judgment, and cannot be collaterally impeached by either of those parties. *Shurbun v. Hooper*, 40 Mich. 503.

Those statutes provide that when the administrator declines to appeal from a decision of the commissioners, any person interested in the estate may appeal from that decision to the Circuit Court; and that, when a claim of the administrator against the estate is disallowed by the commissioners and he appeals, he shall give notice of his appeal to all concerned by personal service or by publication. 2 Howell's Statutes, §§ 5916, 5917. It may well be doubted whether, within the spirit and intent of these provisions, the administrator, when he is also the claimant, is not bound to give notice to other persons interested in the estate, in order that they may have an opportunity to contest his claim before the commissioners; and whether an allowance of his claim, as in this case, in the absence of any impartial representative of the

56 Ark. 324; *Goodwin v. Jones*, 3 Mass. 514. And therefore a foreign executor may not dismiss a suit begun by his testator. *Warren v. Eddy*, 13 Abb. Fr. 28.

In Michigan it has been held that a foreign executor may bring and maintain a suit upon a claim of the testator, provided he obtains letters of administration in Michigan before trial. *Gray v. Franks*, 36 Mich. 382, 49 N. W. 130. See also *Hodges v. Kimball*, 91 Fed. 845. In several States a foreign executor is allowed to sue by statute. *Lawrence v. Nelson*, 143 U. S. 215; *Bell v. Nichols*, 38 Ala. 678. — Ed.

estate, and of other persons interested therein, can be of any binding effect, even in Michigan. See *Lothrop v. Conely*, above cited.

But we need not decide that point, because upon broader grounds it is quite clear that those proceedings are incompetent evidence, in this suit and against these defendants, that the plaintiff is a creditor of Stewart or of his estate.

A judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them.

A judgment recovered against the administrator of a deceased person in one State is no evidence of debt, in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. *Aspden v. Nixon*, 4 How. 467; *Stacy v. Thrasher*, 6 How. 44; *McLean v. Meek*, 18 How. 16; *Low v. Bartlett*, 8 Allen, 259.

In *Stacy v. Thrasher*, in which a judgment, recovered in one State against an administrator appointed in that State, upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the Circuit Court of the United States held within another State against an administrator there appointed of the same intestate, the reasons given by Mr. Justice Grier have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from: —

“The administrator receives his authority from the ordinary, or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction.” 6 How. 58.

In answering the objection that to apply these principles to a judgment obtained in another State of the Union would be to deny it the faith and credit, and the effect, to which it was entitled by the Constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel only between the same parties, or their privies, or on the same subject-matter when the proceeding was *in rem*; and that the parties to the judgments in question were not the same; neither were they privies, in blood, in law, or by estate; and proceeded as follows:

“An administrator under grant of administration in one State stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the

other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts." 6 How. 59, 60.

"It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger." "The laws and courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta*. It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel." 6 How. 60, 61.

In *Low v. Bartlett*, above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: "The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor." 8 Allen, 266.

In the case at bar, the allowance of Johnson's claim by the commissioners appointed by the Probate Court in Michigan, giving it the utmost possible effect, faith, and credit, yet, if considered as a judgment *in rem*, bound only the assets within the jurisdiction of that court, and, considered as a judgment *inter partes*, bound only the parties to it and their privies. It was not a judgment against Stewart in his lifetime, nor against his estate wherever it might be; but only against his assets and his administrator in Michigan. The only parties to the decision of the commissioners were Johnson, in his personal capacity, as claimant, and Johnson, in his representative capacity, as administrator of those assets, as defendant. The present defendants were not parties to that judgment, nor in privity with Johnson in either capacity. If any other claimant in those proceedings had been the plaintiff here, the allowance of his claim in Michigan would have been no evidence

of any debt due to him from the deceased, in this suit brought in New York to recover alleged property of the deceased in New York from third persons, none of whom were parties to those proceedings or in privity with either party to them. The fact that this plaintiff was himself the only party on both sides of those proceedings cannot, to say the least, give the decision therein any greater effect against these defendants.

The objection is not that the plaintiff cannot maintain this bill without first recovering judgment on his debt in New York, but that there is no evidence whatever of his debt except the judgment in Michigan, and that that judgment, being *res inter alios acta*, is not competent evidence against these defendants.

This objection being fatal to the maintenance of this bill, there is no occasion to consider the other questions, of law or of fact, mentioned in the opinion of the Circuit Court and discussed at bar.

*Decree affirmed.*¹

BROWN, J., dissenting.²

VANQUELIN v. BOUARD.

COMMON PLEAS. 1863.

[Reported 15 Common Bench, New Series, 341.]

ERLE, C. J.* — Upon the argument of these demurrers, several questions have been raised with reference to the French law. The founda-

¹ *Acc.* Taylor v. Brown, 35 N. H. 484. And so a Massachusetts executor cannot prove in the Massachusetts Probate Court a balance allowed him on an accounting as ancillary administrator in a foreign court. *Ela v. Edwards*, 13 All. 48.

So generally a judgment obtained in one State against the representative of the deceased there appointed will not be recognized in another State in a suit against the representative there. *Aspden v. Nixon*, 4 How. 467; *McLean v. Meek*, 18 How. 16; *Dent v. Ashley*, Hemph. 54; *Arizona Cattle Co. v. Huber* (Ari.), 38 Pac. 555; *Turner v. Risor*, 54 Ark. 33; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833; *McGarvey v. Darnall*, 134 Ill. 367, 25 N.E. 1005; *Creswell v. Slack*, 68 Ia. 110; *Low v. Bartlett*, 8 All. 259; *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38; *Brodie v. Bickley*, 2 Rawle, 431; *King v. Clarke*, 2 Hill Eq. 611; *Jones v. Jones*, 15 Tex. 463; *Price v. Mace*, 47 Wis. 23; *Tighe v. Tighe, Jr.* 11 Eq. 203. *Contra*, *Creighton v. Murphy*, 8 Neb. 349, 1 N. W. 138, where process was served on the deceased before his death. This is true even though the foreign administrator was the same person as the domestic representative. *Johnson v. McKinnon*, (Ala.) 29 So. 696; *S. v. Fulton*, (Tenn. Ch.) 49 S. W. 297.

In Louisiana it has been held that judgment against an executor may be enforced against him in any other State in which he has also been appointed executor. *Turley v. Dreyfus*, 33 La. Ann. 885. And in a few States it has been held that where judgment has been obtained against an executor he may be sued on it personally in another State. *Latine v. Clements*, 3 Ga. 426; *White v. Archbill*, 2 Sneed, 588. — ED.

² The dissenting opinion is omitted. — ED.

* The statement of facts, arguments of counsel, and part of the opinion, in which the validity of certain pleas is discussed, are omitted. WILLIAMS and KEATING, JJ., delivered concurring opinions. — ED.

tion of the litigation was certain bills of exchange of which the deceased, Jacques Alexander François Vanquelin, was drawer, the defendant the acceptor, and one Bolli the indorsee. Bolli brought an action against both drawer and acceptor in the Court of the Tribunal de Commerce of the department of the Seine, and obtained judgment against them. Vanquelin, the drawer, died: his widow, the now plaintiff, in accordance with the laws of France, became the donee of the universality of the real and personal estates belonging to the succession of the deceased at his death; and she alleges that thereby and according to the laws of France all rights, claims, and causes of action, and all liabilities and obligations of the deceased vested in her personally and absolutely, and she became, according to the said laws, liable personally upon the said judgment, and also entitled personally and in her own name to sue for and enforce all the rights and claims of the deceased, and that she was according to the said laws substituted for and placed in the same position with respect to the defendant, as regarded the said bills of exchange and the judgment thereon, to all intents and purposes, as the deceased had been in his lifetime. The count then goes on to allege that afterwards, and whilst the judgment was in full force and unsatisfied, and the plaintiff and defendant were both liable thereupon, the plaintiff, in accordance with the laws of France, was obliged to pay and did pay the full amount of the judgment and all interest due thereon, and that thereupon Bolli delivered to her the said bills of exchange and the record of the said judgment, and the plaintiff then became and still was according to the laws of France entitled to the benefit of all the rights of Bolli upon the said judgment against the defendant, and entitled to enforce the same against the defendant, and to be substituted for Bolli in all his rights against the defendant in respect of the said judgment; and that the defendant became indebted and liable to pay her the amount so paid by her upon the said judgment, with 6 per cent interest thereon until payment. The count then goes on to allege that the plaintiff, having these rights, in order to keep alive the liability of the defendant, and to prevent the same from being barred by lapse of time, and in order to give effect to and enforce her claim against the defendant, took proceedings in the Tribunal Civil of the First Instance of the department of the Seine, and that thereupon, according to the practice and procedure of the said court, on the 2d of April, 1862, by adjudication of the said court an injunction was made to the defendant to pay certain sums of money for principal, interest, and costs, and it was adjudged and notified to the defendant that he would be constrained to do so by all lawful means and by arrest of his body. That is the substance of the first count. The substance of the second count is, that certain bills of exchange were drawn upon the defendant by the deceased, and accepted by him, and dishonoured; that the deceased died, and the plaintiff was according to the laws of France the donee of the universality of the personal and real estates belonging to the succession of the deceased, and thereupon became entitled to all debts,

claims, and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely, in the same manner to all intents and purposes as they were vested in the deceased, and the plaintiff was entitled to demand and sue for the same in her own name and in her own right, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and she became entitled to sue the defendant thereupon in her own name and in her own right; and she demands payment of the amount thereof and interest. The ground of the demurrer to these two counts, is, that the plaintiff is in effect suing in a representative character, which she cannot do without having obtained letters of administration in this country. The allegation in both counts is, that, being donee of the universality of the personal and real estates belonging to the succession of her deceased husband, the plaintiff became according to the laws of France entitled to all the property and rights of the deceased absolutely in her own right, and not in any representative capacity. I am of opinion that that averment, if it were necessary to stand upon it, must be taken to be true, and so it appears upon the record that the law of France, in which country all the parties were domiciled, would give her a *locus standi* to sue there in her personal capacity. But it is not necessary to rest upon that. The first count shows, that, after the death of her husband, the plaintiff paid the amount due to Bolli in respect of the bills and the judgment; and that, it seems, would give her the right to sue in the courts of France in her own name and in her own right, as indeed it would in this country also. It has on many occasions been held that an executor or administrator has his election to sue either in his own right or in his representative character in respect of transactions arising since the death of the testator or intestate, although what is recovered would be assets in his hands. Here, the alleged cause of action is founded mainly upon what was done by the plaintiff after the death of her husband. There is a further answer to the demurrer to the first count, viz. that the rights of the plaintiff were confirmed by the second adjudication or injunction obtained by her in the Tribunal Civil of the First Instance of the department of the Seine, which entitled her to execution against the defendant in that country. It seems to me, therefore, that there is abundant on the first count to show that the plaintiff has a good cause of action against the defendant in her individual capacity, without having recourse to the special matter before adverted to. As to the demurrer to the second count, it is clear that the plaintiff took the bills on the death of her husband, and, if nothing more appeared, she could only enforce them here by clothing herself with the character of his representative. But the law of domicile attaches to these parties; and there is a distinct averment that the plaintiff was, according to the laws of France, "the donee of the universality of the personal and real estates belonging to the succession of the deceased, and thereupon became entitled to all debts, claims,

and causes of action which the deceased was entitled to, and the same became and were according to the said laws vested in the plaintiff personally and absolutely in the same manner to all intents and purposes as they were vested in the deceased, and the plaintiff was and is entitled to demand and sue for the same *in her own name and in her own right*, and the claims and rights of the deceased upon the said bills became vested in the plaintiff, and the plaintiff became entitled to sue the defendant thereupon *in her own name and in her own right*." I think it sufficiently appears upon this record that the plaintiff was entitled to sue upon these bills in her own right; the fact of her being the donee of the universality of the personal and real estates belonging to the succession of her deceased husband giving her by the law of France rights different from those which an executor or an administrator has in this country. I am therefore of opinion that the plaintiff is entitled to our judgment upon the demurrers to both counts of the declaration.¹

CURRIE v. BIRCHAM.

KING'S BENCH. 1822.

[Reported 1 Dowling & Ryland, 35.]

ASSUMPSIT for money had and received by the defendants to the plaintiff's use. The defendants pleaded the general issue; the statute of limitations; and several special pleas. The question at the trial arose upon the plea of the general issue. At the trial before ABBOTT, C. J., at the Guildhall Sittings after last Michaelmas Term, the case proved in evidence was this: In the year 1806, Norman Newby, quartermaster of the 84th regiment of foot, went out to India, indebted to the plaintiff, a laceman in London, and to other tradesmen, for his military equipments, and other property of considerable value. Shortly after his arrival in India, he died intestate. His wife took

¹ Where by the law of the domicil of the deceased a universal successor legally becomes entitled at the death to all his rights and subject to all his liabilities, such successor may sue or be sued upon such rights or liabilities in a foreign State. *Beavan v. Hastings*, 2 K. & J. 724; *King v. Martin*, 67 Ala. 177.

A representative may sue in a foreign State upon any right which did not form part of the estate of the deceased, but accrued to him after the death, even though he will be accountable as such representative to his court for what he recovers. *Perkins v. Stone*, 18 Conn. 270; *Steitler v. Helenbush*, (Ky.) 61 S. W. 701. Thus he may sue upon a note running to him as administrator: *Rittenhouse v. Ammerman*, 64 Mo. 197; *Tillman v. Walkup*, 7 S. C. 60; upon a judgment assigned to him as administrator: *Rucks v. Taylor*, 49 Miss. 552; upon a policy of insurance taken out by him on the property of the estate: *Abbott v. Miller*, 10 Mo. 141; to recover a deposit he has made as administrator in a foreign bank: *Bingham v. Marine Nat. Bank*, 112 N. Y. 661, 19 N. E. 416; to recover dividends on stock in a foreign corporation: *Smith v. Cuyler*, 78 Ga. 654, 3 S. E. 406. — Ed.

out letters of administration of his effects in the Recorder's Court at Bombay; and, having collected some of his effects, realized the proceeds in government bills, drawn on England, and returned to this country, leaving a brother officer of her husband to collect the remainder of his effects, and remit the proceeds in like manner, for her account, after she quitted India. The defendants' testator, John Moore, had been Mr. Newby's agent, and all the bills in question came to his hands through the medium of Mrs. Newby, and as was alleged, converted by him into cash. The plaintiff being unable to obtain payment of his debt, in the year 1816, took out letters of administration of the estate and effects of Mr. Newby, as his creditor, in the Prerogative Court of the Archbishop of Canterbury, and filed a bill in Equity against Mr. Moore, and Mrs. Newby (who was then married to another husband), to account for the money which had come into their hands, the property of the intestate. In his answer to this bill, filed in 1817, Mr. Moore stated, that he had paid over all the money which had come to his hands, to Mrs. Newby, as the administratrix of her husband's effects and as her agent, with the exception of a sum of £170 which he retained for a debt contracted with him by the intestate when living. Mr. Moore afterwards died, and by his will appointed the defendants his executors, against whom the present action was brought. At the trial, the plaintiff's claim was reduced to the sum of £170 which Mr. Moore, in his answer to the bill in Chancery, admitted he had retained in his hands for a debt due to him from the intestate. The question was, as to the plaintiff's right to sue. It was objected, that the letters of administration granted by the Recorder's Court at Bombay to Mrs. Newby, must prevail against the administration granted to the plaintiff in this country, and that if any action lay against Moore's executors, it must be at the suit of Mrs. Newby, he having been her agent. Of this opinion was ABBOTT, C. J., who nonsuited the plaintiff, but gave him leave to move to enter a verdict for the sum of £170 above-mentioned, if the court should be of opinion that the action was well brought.

Marryat now moved accordingly to set aside the nonsuit, and enter a verdict for the plaintiff for £170. He contended, that the plaintiff was entitled to maintain this action by virtue of the letters of administration granted to him in this country. Admitting that the letters of administration granted to Mrs. Newby, in the Recorder's Court of Bombay, to be valid and effectual in that country, still they could not operate here; and therefore it was incumbent on Mrs. Newby, if she meant to act as administratrix of her husband's effects, to have taken out letters of administration in this country. This she had not done; and the letters granted to her in India could not prevail against those which had been granted to the plaintiff by the Prerogative Court. The operation of her letters had ceased on her quitting India. Then, as the effects of Newby were not realized until they reached this country, when the bills were converted into cash, the plaintiff was entitled to administer that

money by virtue of the administration which he had obtained, and consequently this action was well brought. *Vide* *Tourton v. Flower*, 3 P. Wms. 369; *Jannery v. Sealey*, 1 Vent. 89; and 26 Geo. III. c. 57.

PER CURIAM. We are of opinion that this action will not lie at the suit of this plaintiff. The wife of the intestate is entitled to all the effects of which her husband died possessed in India, by virtue of the letters of administration granted to her in that country. It is not suggested that the sum of money in question was not a part of the proceeds of the intestate's effects. The effects are remitted to this country by her in the shape of bills, and they come to the hands of her agent Moore. He receives the money to her use, and in her own right as administratrix. If she has any claim upon the money, which it is alleged that Moore retained in his hands, she may maintain an action, but it will not lie at the suit of this plaintiff, under the letters of administration which he has obtained.

*Rule refused*¹

PETERSEN v. CHEMICAL BANK.

COURT OF APPEALS, NEW YORK. 1865.

[*Reported 32 New York, 21.*]

THIS action was brought in the Superior Court of New York to recover the sum of \$32,821.24, being an amount standing to the credit of Aaron Cohen, as a dealer on the books of the defendants' bank in New York. Cohen died at the city of New Haven in Connecticut, on the 27th day of July, 1862. He left a last will and testament, executed in New York, on the 11th June, 1861, which was duly attested by two witnesses, by which he appointed David McCoard and Cohen M. Soria of New Orleans, executors. The will was proved and admitted to record in the Probate Court of the District of New Haven, in September, 1862; and the executors not appearing to qualify, and one of them having renounced, administration with the will annexed was granted to David J. Peck of New Haven, he giving a bond with several sureties, in the penalty of \$200,000, conditioned to make an inventory, and to account, etc. He demanded of the defendants the above amount standing to the credit of Cohen, presenting an authenticated copy of his appointment, but payment was declined. He then, on the 2d December 1862, made a transfer under his hand and seal of the debt due from the defendants to the plaintiff in this action. The

¹ *Acc.* *Williamson v. Branch Bank*, 7 Ala. 906; *Holcomb v. Phelps*, 16 Conn. 127; *Norton v. Palmer*, 7 Onsh. 523; *Dorsay v. Connell*, 22 N. B. 564. *Contra*, *Naylor v. Moffatt*, 29 Mo. 126. And see *Bond v. Graham*, 1 Hare 482.

Where personal property is brought into a State after the death of the deceased, the executor or administrator appointed in the State where the property was at the death may sue in the former State for injury to the property. *Clark v. Holt*, 16 Ark. 257; *Embry v. Millar*, 1 A. K. Marsh. 300.—ED.

instrument is expressed to be in consideration of \$32,321.24 received to the assignor's full satisfaction; and it contains proper words of sale and assignment, and a guaranty of the collection of the amount, and a promise to indemnify the plaintiff against loss by reason of the purchase. The plaintiff called at the bank with this instrument, presenting his own check and also that of Peck, and demanded the money. He also exhibited an instrument, signed by all the legatees named in the will, with the exception of one who resided in an insurgent State, and who was entitled to one-sixth of the residue, requesting that the money might be paid over to Peck as administrator; but the defendant persisted in refusing payment, on the ground, apparently, that it could not safely be paid, except to an administrator appointed under the laws of this State.

The controverted questions of fact to which the evidence on the trial was directed, related to the domicile of Cohen at the time of his death, and to the circumstances under which the transfers to the plaintiff were made.¹

It was very clearly proved that he owed no debts in New York, and only a few very small sums in New Haven. The legatees in his will, besides \$15,000 to a friend in New York and \$5,000 to another in New Orleans, and \$5,500 to his servants, were his brothers and sisters in New York, New Orleans, and Philadelphia.

In regard to the transfer, the evidence was that the plaintiff was one of the sureties of Peck in the administration bond, and had acted as his agent in the settlement of the estate. The consideration did not appear to have been paid absolutely. The amount was advanced by the plaintiff, and, together with other moneys of the estate, was deposited in a bank in the name of the plaintiff as trustee, he having, however, by the arrangement, no right to claim it, except by the direction of Peck, the intention apparently being that it should be paid out in the course of administration.

The defendant's counsel moved for the dismissal of the complaint, on the grounds that an action would not lie by an assignee of a foreign administrator; that there was no consideration for the transfer, and that it was made to evade the laws of this State, and that the Probate Court in Connecticut had not jurisdiction; and the counsel also insisted that the question as to the domicile of Cohen should, at least, be submitted to the jury. The motion was denied, and the judge instructed the jury to find for the plaintiff. The defendant's counsel excepted. It was directed that the exceptions be heard, in the first instance, at the General Term. The verdict was for the plaintiff for the amount claimed, with interest; and judgment for the plaintiff was rendered thereon at the General Term, upon which the defendant brought this appeal.

¹ So much of the statement of facts and opinion as involve the decision of this question of fact is omitted. The arguments of counsel and concurring opinion of POTTER, J., are also omitted. — Ed.

DENIO, C. J. The evidence was quite conclusive that the domicile of Cohen at the time of his death was at New Haven. . . . A foreign executor or administrator (and one appointed under the laws of a sister State of the Union is foreign in the sense of the rule), cannot sue in his representative character in the courts of this State. The question whether a party deriving title to a chose in action by transfer from such an executor or administrator, can prosecute the debtor residing here, in our courts, has been variously decided in the cases to which we have been referred. In the Supreme Court in the first district, the Merchants' Bank of New York was sued for refusing to transfer to the plaintiff one hundred shares of its stock, to which the latter made title by transfers from the executors of one Robert Middlebrook, in whose name the stock stood on the books of the bank. He died at his residence in Connecticut, and his will had been proved, and letters testamentary had been issued by the Probate Court of the proper district in that State. The plaintiff was a legatee of a certain amount of the testator's stock, and the shares in controversy had been assigned to him in satisfaction of the legacy. The court held that the executors became vested with the title to the stock, and that the plaintiff, though he derived his title under them, could enforce his right against the bank in our courts, and judgment was accordingly given in his favor. *Middlebrook v. The Merchants' Bank*, 27 How. Pr. 474; s. c. at Special Term, 24 How. Pr. 267.

A different rule has been established in the courts of New Hampshire and of Maine. *Thompson v. Wilson*, 2 N. H. 291; *Stearns v. Burnham*, 5 Greenl. 261. In each of these cases the defendant was sued as the maker of a promissory note, by parties claiming as indorsees under indorsements by the executors of the payees who were respectively residents of Massachusetts, and whose wills were proved and letters thereon issued in that State. The defendants prevailed in each case, on the objection that the respective plaintiffs were subject to the same disability to sue which would have attached to the executors if they had attempted to prosecute in another State than that under whose laws their letters testamentary were granted. In the first case the judgment was placed upon the English ecclesiastical law, by which probates of wills and grants of administration are void when not made by the *ordinary* of the proper diocese, a doctrine which I do not think applicable to questions arising between different States, as it makes no allowance for the principles of international comity. In the case in Maine, it was thought that allowing a recovery would be an indirect mode of giving operation in Maine to the laws of Massachusetts, and also that the effects of the deceased might thereby be withdrawn from the State, to the prejudice of creditors residing there.

The precise case now before us came before the Supreme Court of the United States in *Harper v. Butler* (2 Pet. 239). The suit was brought in Mississippi, on a chose in action, originally existing in favor of a citizen of Kentucky, who died there, and whose executor

having letters testamentary issued in that State, assigned it to the plaintiff. In Mississippi, choses in action are assignable so as to permit the assignee to sue in his own name, as is now the case in this State. The question arose on demurrer to the complaint, and the District Court sustained the demurrer. The judgment was reversed upon a short opinion by Chief Justice Marshall, which merely states the point, and contains no general reasoning. No counsel appeared on behalf of the defendant.

The case in Maine has been made the subject of comment in Story's *Treatise on the Conflict of Laws* (§§ 258, 259), and is decidedly disapproved by the learned writer. He says, that upon the reasoning of the case a promissory note would cease to be negotiable after the death of the payee, which, he observes, would certainly not be an admissible proposition.

It seems clear to me that there are no precedents touching the question which are binding upon this court, or which can relieve it from the duty of examining the question upon principle. There are certain legal doctrines, now very well established, which have a strong bearing upon the point. It is very clear, in the first place, that neither an executor or administrator, appointed in a foreign political jurisdiction, can maintain a suit in his own name in our courts. Foreign laws have no inherent operation in this State; but it is not on this account solely or principally that we deny foreign representatives of this class a standing in our courts. The comity of nations, which is a part of the common law, allows a certain effect to titles derived under and powers created by the laws of other countries. Foreign corporations may become parties to contracts in this State, and may sue or be sued in our courts on contracts made here or within the jurisdiction which created them. The only limitation of that right is the inhibition to do anything in its exercise which shall be hostile to our own laws or policy. *Bank of Augusta v. Earle*, 13 Pet. 519; *Bard v. Poole*, 2 Kern. 495, 505, and cases cited. And yet nothing can be more clearly the emanation of sovereign political power than the creation of a corporation. Again, the receivers of insolvent foreign corporations, and assignees of bankrupt and insolvent debtors, under the laws of other States and countries, are allowed to sue in our courts. It is true their titles are not permitted to overreach the claims of domestic creditors of the same debtor, pursuing their remedies under our laws; but in the absence of such contestants they fully represent the rights of the foreign debtors. Story's *Conf. Laws*, § 112; *Hoyt v. Thomasen*, 1 Seld. 320; s. c. 19 N. Y. 207; *Willets v. Waite*, 25 N. Y. 584. It is not therefore because the executor or administrator has no right to the assets of the deceased, existing in another country, that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicil of the deceased, is recognized everywhere. Reasons of form, and a solicitude to protect the rights of creditors and

others, resident in the jurisdiction in which the assets are found, have led to the disability of foreign executors and administrators, which disability, however inconsistent with principle, is very firmly established. We have lately decided that if the debtors of the deceased will voluntarily pay what they owe to the foreign executor, such payment will discharge the debts, and the moneys so collected will be subject to the administration of such foreign executor. *Parsons v. Lyman*, 20 N. Y. 103.

But the principle of law which I think governs this case is, that the succession to the personal estate of a deceased person is governed by the law of the country of his domicile at the time of his death. This is so whether the succession is claimed under the law providing for intestacy or for transmission by last will and testament. See *Parsons v. Lyman*, *supra*, and authorities cited at p. 112. It is not so held because the foreign legislature or the local institutions have any extra-territorial force, but from the comity of nations. Accordingly, it is a necessary supplement to the doctrine that, if the law-making power of the State where the property happens to be situated, or the debtor of the deceased reside, to subserve its own policy, has engrafted qualifications or restrictions upon the rights of those who would succeed to the estate by the law of the domicile, they must take their rights subject to such restrictions. One of the most natural, as well as the most usual of these qualifications is that which is intended to secure the creditors of the deceased residing in the country where the assets exist. It is in part to subserve this policy that the personal representatives are not permitted to prosecute the debtor or parties who withhold his effects in our courts. But the protection to the creditor is further secured by the remedy which is provided by allowing them to take out administration in the jurisdiction where the assets are. If the deceased have any relatives in this State who would be preferably entitled, they can be summoned, and if they elect to take out letters themselves, they will be compellable to give bond, and the creditors will be then made secure in their rights, or if the relatives refuse to assume that responsibility, then the creditors may themselves be appointed, and thus qualified to take possession of the assets here upon the same terms. 2 R. S. 73, §§ 23, 24. If the debtors of the estate elect to pay to the former representative, or to deliver to him the movable assets, before the granting of administration in this State, the domestic creditors are put to the inconvenience of asserting their rights in the courts of the country of their debtor's domicile against his representatives appointed under the laws of that country, just as they would have been compelled to do if all his effects had been situated there. Another general principle of law necessary to be averted to is, that the executor of a testator, as soon at least as he has clothed himself with the commission of the Probate Court, is vested with the title to all the movable property and rights of action which the deceased possessed at the instant of his death. The title of the executor,

it is true, is fiduciary and not beneficial. That title is, however, perfect against every person except the creditors and legatees of the deceased. The devolution of ownership is direct to the representative, and the beneficiaries take no title in the specific property which the law can recognize. An administrator with the will annexed, has the same rights of property as the executor named in the will would have had if he had qualified. 2 R. S. 72, § 22.

The law of maintenance while it existed, prohibited the transfer of the legal property in a chose in action, so as to give the assignee a right of action in his own name. But this is now abrogated, and such a demand as that which is asserted against the defendant in this suit may be sold and conveyed so as to vest in the purchaser all the legal, as well as the equitable rights of the original creditor. Code, § 111. Though such demands are not negotiable in precisely the same sense as commercial paper, since the assignee is subject to every substantial defence which might have been made against the assignor, yet where, as in this case, no such defence exists, the transfer is absolute and complete. The title which is vested in the executor carries with it the *jus disponendi* which generally inheres in the ownership of property. "It is a general rule of law and equity," says Judge Williams, in his treatise on executors, "that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee." Treatise, p. 796; see also *Whale v. Booth*, 7 Term R. 625, in note to *Farr v. Newman*; *Sutherland v. Breesh*, 7 Johns. Ch. 17; *Rawlinson v. Stone*, 3 Wils. 1; *Harper v. Butler*, *supra*.

It follows that the plaintiff presented himself to the Superior Court as the owner by purchase and assignment of the debt against the defendant, from a person holding the title and hence having authority to sell. He claimed to recover, not as the representative of any other party, but as the substituted creditor of the defendants' bank. He had, it is true, to make title through the will of Cohen, and the proceedings of the Probate Court of Connecticut. But the validity of that title depended upon the law of Connecticut, that being the place of the domicile of the former owner of the demand. The validity of every transfer, alienation, or disposition of personal property depends upon the law of the owner's domicile. Story on Conf. of Laws, § 383. In the absence of proof to the contrary, we assume the law of Connecticut respecting the alienation of choses in action to be the same as our own. If Cohen had, at his death, been a resident of this State, and his administrator with the will annexed had sold and assigned to the plaintiff his demand against the bank, there is no manner of doubt but that the assignee, upon the refusal of the bank to pay the amount, could have maintained this action.

Hence there is not, I think, any reason why the plaintiff should be precluded from maintaining his action, on account of his making title

through a foreign administration. The rule is not that our courts do not recognize titles thus acquired. It is simply that a foreign executor or administrator can have no standing in our courts. The plaintiff does not occupy that position. He sues in his own right and for his own interest, and represents no one. In my opinion, the disability to sue does not attach to the subject of the action, but is confined to the person of the plaintiff. If he is an unexceptionable suitor, and there is no rule of form or of policy which repels him from our courts, he is to be received, and he may make out his title to the subject claimed, in any manner allowed by law; and it has been shown that title acquired through a foreign administration is universally respected by the comity of nations.

It is pretty obvious from the evidence of the circumstances of the transfer by Peck to the plaintiff, that its object was to avoid the objection which might be taken if Peck had sued in his own name as administrator, without taking out letters here. There was no other conceivable motive for the plaintiff to purchase this moneyed demand payable immediately, for its precise amount paid down. If his check on the bank, drawn shortly after the transfer, had been answered, he would have received the precise amount he had parted with, and the transaction at the best would have been paying with one hand to receiving the same amount back with the other. If he failed to realize the amount, he was to be indemnified by Peck. This circumstance, and the manner in which the assumed consideration was disposed of, would doubtless have led the jury to find, that the form adopted was resorted to in order to enable the administrator to avail himself of the balance in the defendant's bank, without taking out administration here. Still, as between the plaintiff and Peck, the interest in the demand passed. Peck would have been estopped by his conveyance under seal, containing an acknowledgment of the payment of the consideration, from setting up that nothing passed by the conveyance. I am of opinion that the defendant cannot make a question as to the consideration. If all the parties had been residents of this State, a transfer of the demand, good as between the parties to that transfer, would have obliged the defendant to respond to the action of the transferee. Then if we hold, as I think we should, that the objection to the suit of the administrator was in the nature of a personal disability to sue, and not an infirmity inhering in the subject of the suit, the fact that the transfer was made for the purpose of getting rid of the objection, should not prejudice the plaintiff. The cases which have been referred to upon this point have considerable analogy. The Constitution and laws of the United States confer upon the courts of the Union jurisdiction in suits between citizens of different States, with an exception contained in an act of Congress, of one suing as the assignee of a chose in action, of a party whose residence was such as not to permit him to sue. In an action by an assignee concerning the title to land, which was not within the exception, it was held not to

be an objection which the defendant could take, that the assignment was made for the purpose of removing the difficulty as to jurisdiction. *Briggs v. French*, 2 Sumn. 251. In a late case in this court against a foreign corporation, which could not be prosecuted here except by a resident of this State, unless the cause of action arose here or the subject of the action was situated here, it was held that the objection — that the assignment of the demand by one not qualified by his residence to sue, to the plaintiff who was thus qualified, was made for the purpose of avoiding the difficulty — could not be sustained. *McBride v. The Farmers' Bank*, 26 N. Y. 450.

I have not thus far referred to the circumstance, that Cohen was shown not to have owed any debts in this State. That fact was proved as strongly as in the nature of the case such a position could be established. The administrator, whose business it was to ascertain the existence of debts, and the confidential servant of Cohen who was very familiar with his transactions, affirmed that there were none; and the defendant gave no evidence on the subject. The motive of policy for forbidding the withdrawal of assets to the prejudice of domestic creditors, did not therefore exist in this case. Still, if the rule is that neither the foreign administrator or his assignee can maintain an action in our courts to collect a debt against a debtor residing here, on account of its tendency to prejudice domestic creditors, the exceptional features of the present case would not change the principle. It would often be more difficult than in this case to disprove the existence of such debts. But I am of opinion that the objection should be regarded as formal, and that it does not exist where the plaintiff is not a foreign executor or administrator but sues in his own right, though his title may be derived from such a representative.

I am in favor of affirming the judgment of the Supreme Court.

*Judgment affirmed.*¹

¹ *Acc. Harper v. Butler*, 2 Pet. 239; *Camp v. Simon*, (Utah) 63 Pac. 332; *Munson v. Exchange Nat. Bank*, 19 Wash. 125, 52 Pac. 1011. But see *Heyward v. Williams*, 57 S. C. 235, 35 S. E. 503. Where negotiable paper, part of the estate, is transferred by the representative appointed in the State of domicile of the deceased, the transferee may sue in another State in his own name. *Campbell v. Brown*, 64 Ia. 425; *Rand v. Hubbard*, 4 Met. 252 (*semble*); *Owen v. Moody*, 29 Miss. 79; *Gove v. Gove*, 64 N. H. 503, 15 Atl. 121 (see *Thompson v. Wilson*, 2 N. H. 291); *Mackay v. St. Mary's Church*, 15 R. I. 121, 23 Atl. 108. *Contra*, *Stearns v. Burnham*, 5 Me. 261; *McCarty v. Hall*, 13 Mo. 480. So a foreign representative may sue in his own name on a note payable to bearer. *Knapp v. Lee*, 42 Mich. 41, 3 N. W. 244. And if he is allowed by statute to sue, in a foreign State, he may sue on a note payable to the deceased, though there is a local representative. *Eells v. Holder*, 2 McCrary, 622, 12 Fed. 668. So a foreign executor may present a note payable to his testator for payment or protest. *Rand v. Hubbard*, 4 Met. 252.

When the representative at the domicile of the deceased transfers stock, the transferee may have the stock transferred to his name on the books. *Brown v. S. F. Gaslight Co.*, 58 Cal. 426; *Luce v. R. R.*, 63 N. H. 589, 3 Atl. 618; *Middlebrook v. Merchants' Bank*, 3 Keyes, 135, 3 Abb. Dec. 295. And a foreign executor has a right to vote on stock belonging to his testator. *In re Election of Cape May, &c. Nav. Co.*, 51 N. J. L. 78, 16 Atl. 191. — Ed.

CHAPTER XIV.
THE ADMINISTRATION OF ESTATES.

SECTION I.

ESTATES OF DECEASED.

STEVENS v. GAYLORD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1814.

[*Reported 11 Massachusetts, 256.*]

JACKSON, J.¹ The determination of this cause depends on the sufficiency of the defendant's second plea in bar. In that plea he admits, in effect, that he was indebted to the intestate, as alleged in the declaration, and that the plaintiff is administrator, duly appointed in this State, of the effects of the deceased; but he alleges, in his defence, that before the plaintiff was so appointed administrator, he, the defendant, and one Philemon Gaylord, who were both inhabitants and residents in Connecticut, were duly, and according to the laws of Connecticut, appointed administrators of the effects of the said deceased, by a certain judge of probate there, who had the power of granting such administrations; that they gave bond to the said judge, with condition to exhibit an inventory, and to render their account to him; that they did accordingly exhibit an inventory of all the effects of the deceased, which had come to their knowledge, including therein all the moneys due from the defendant to the deceased on the notes and demands specified in the plaintiff's declaration; by means of all which the defendant is holden and obliged to account to the said judge of probate in Connecticut for all the said moneys.

The plaintiff assigns, as a special cause of his demurrer to this plea, that it is not alleged therein that the said Tibbals, at the time of his decease, or at any time before, resided or had his home in Connecticut; and, on examining the other parts of this record, it appears that such an averment was made in another plea; and being traversed, the issue was found for the plaintiff.

¹ Part of the opinion is omitted. — Ed.

We are well satisfied that this point is wholly immaterial in the decision of this cause. The right of granting administration is not confined to the State or country in which the deceased last dwelt. It is very common, and often necessary, that administration be taken out elsewhere. If a foreigner, or a citizen of any other of the United States, dies, leaving debts and effects in this State, these can never be collected by an administrator appointed in the place of his domicil; and we uniformly grant administration to some person here for that purpose. This is the rule of the common law, and it is adopted, as we understand, in most of the United States. [Goodwin v. Jones, 3 Mass. Rep. 514; Dawes v. Boylston, 9 Mass. Rep. 337; Borden v. Borden, 5 Mass. Rep. 67; Langdon *et al.* v. Potter, 11 Mass. 313.]

In such case, however, the administration granted here is considered as merely ancillary to the principal administration, granted in the jurisdiction where the deceased dwelt. It is true that such ancillary administration is not usually granted until an administrator is appointed in the place of the deceased's domicil. But this cannot be a necessary prerequisite; for if so, and it should happen that administration is never granted in the foreign State, the debts due here, under such circumstances, to a deceased person could never be collected; and the debts due from him to citizens of this State might remain unpaid.

The time of granting the respective letters of administration is also immaterial in this case. The administrators in Connecticut, if duly appointed, must collect all the effects of the deceased in that State, whilst the plaintiff will do the like here; and the residue, after paying the debts of the deceased, wherever collected or remaining, must be distributed according to the laws of the State in which the deceased dwelt. If it should appear, upon due examination in our Probate Court, that Tibbals had his home in Connecticut, we should cause the balance remaining in the hands of the administrator here to be distributed according to the laws of Connecticut, or transmitted for distribution by the administrator in Connecticut, under the decree of the Probate Court there. And we cannot doubt that the courts in Connecticut would, under like circumstances, adopt the same principle of comity and justice. Ambler, 25; 2 Vesey, 35; 2 B. & P. 229, *in notis*; Bruce v. Bruce, 9 Mass. Rep. 337; Dawes, Judge, &c. v. Boylston; [Harvey v. Richards, 1 Mason, 381; Dawes v. Head, 3 Pick. 128, 2 Kent. 344; Decouché v. Savetier, 3 Johns. Ch. 310; Dixon v. Ramsay, 3 Cran. 319; United States v. Crosby, 7 Cran. 115; Bruce v. Bruce, 2 B. & P. 229.]

Having disposed of these two subordinate points, the great question in the cause still remains, — whether, if the debtor of an intestate be duly appointed administrator in another State, that circumstance, together with the others stated in this plea, furnishes a sufficient defence.¹ . . .

It was suggested in the argument, that the notes on which this action

¹ The learned judge held that the defence stated in the plea was a good one. — Ed.

is brought were in this State at the death of the intestate. This fact does not appear on the record; and, if material, it should have been pleaded. But if the notes were here, the debtor being a citizen of Connecticut, might be effectually discharged by a release from any administrator in Connecticut having lawful authority to receive the debt. And, further, the notes, under such circumstances, could never be recovered, in the ordinary course of things, without being sent to Connecticut, and demanded by an administrator duly appointed there.

The circumstance of the defendant's having come into this State, so as to expose himself to this action, cannot affect the general principle. The law would be the same if that contingency had not happened; in which case the debtor could never be compelled to pay but to an administrator duly authorized in Connecticut; and of course a release given to him by such an administrator would bar any subsequent action for the same debt.

Another reason why this money should be accounted for in Connecticut is, that all the effects of the deceased are liable, in the first instance, to his creditors there. No principle of comity requires of that government to lend their aid in collecting the effects of the deceased, and to send those effects out of their country, whilst any of their citizens have just and legal claims upon the fund. This debt, then, was assets, liable to the claims of all creditors, citizens of Connecticut, and they ought not to be deprived of this advantage merely because the debtor is himself appointed administrator. . . . *Defendant's plea good.*¹

FAY v. HAVEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported 3 Metcalf, 109.*]

DEBT on a probate bond, dated September 1, 1835, given by Thomas Haven, as principal, and the other defendants, as sureties, for the faithful performance by Haven of his duties as administrator of the estate of Samuel Livermore, late of New Orleans in the State of Louisiana.²

¹ The appointment of an ancillary administrator will not be made (in the absence of a statute requiring it) if it is not necessary for the proper distribution of the assets. *Washburn's Estate*, 45 Minn. 242, 47 N. W. 790. The principal administrator cannot demand the appointment. *In re Estate of Neubert*, 58 S. C. 469, 36 S. E. 908.

A testator may, however, name two executors, one to act in each of two States; and each will then have, in the State in which he is named to act, such right to act as any executor named. *Sherman v. Page*, 21 Hun, 65.

The cases, almost without exception, treat a foreign executor and administrator in the same way. The few cases which suggest a distinction, in some respects, between their powers probably do not represent the law. See, for instance, *Winchester v. Bank*, 2 G. & J. 80; *Grant v. Reese*, 94 N. C. 720. — Ed.

² Statement of facts is omitted. — Ed.

DEWEY, J. That this action may be maintained for such a breach of this bond as will authorize a judgment for nominal damages, seems to us to be very clear. The Rev. Sts. c. 68, § 25, authorize such action, "if any executor or administrator shall neglect to render and settle his accounts in the probate court within six months after the return made by the commissioners, or after the final liquidation of the demands of the creditors, or within such further time as the judge of probate shall allow therefor, so as to delay a decree of distribution." The facts stated in the case show such neglect of the administrator to render and settle his accounts within the time limited by the statute.

It was suggested by the defendants' counsel, that an executor or administrator is not liable to an action unless he has neglected to render and settle his account, after having been first cited by the judge of probate to render it. Such is the provision of c. 67, § 9, providing the remedy for neglect to render and settle the accounts of administrators in cases of solvent estates; but we think it does not apply to cases like the present, which seem to be specially provided for in c. 68, § 25, and where the mere neglect to render the account, within the period prescribed by the statute, subjects the administrator to a suit, without any previous citation from the judge of probate.

The question of more difficulty in the present case is that which arises upon the claim of the plaintiff, in behalf of the creditors in Massachusetts, to hold the defendant responsible upon this bond for certain property of said Livermore, deceased, which came into the hands of said Haven (the principal in this bond), in the State of Louisiana, by virtue of his appointment as one of the executors of said Livermore, and his subsequent appointment, by the court of probate there, as tutor to his children, who were legatees under the will.

By the facts stated by the parties, it appears, that Samuel Livermore had been for many years a resident in New Orleans, and had his domicile there at the time of his decease; that said Haven and one Ogden were constituted executors of his will and duly authorized to act, as such, under the laws of Louisiana, and that the property, for which it is now attempted to make the defendants chargeable, on the bond, to the plaintiff as judge of probate for the county of Middlesex, is the avails of certain personal and real estate, which came to the hands of said Haven in the State of Louisiana, under the authority of the Probate Court of New Orleans, received and held by him, either in the capacity of executor in Louisiana, or as a tutor legally constituted there, to hold the same for the benefit of his children, or to a small amount, held as payment of a legacy to his wife under the said will. No specific property of said Livermore is or has been in the hands of said Haven in this Commonwealth, except the valuable collection of books received by the corporation of Harvard College, by virtue of a specific bequest to them by Mr. Livermore (and which the executors transmitted from Louisiana), and certain real estate which was duly returned in the inventory taken here.

tion of both the personal and real which came to the hands of Haven, Louisiana; personal estate being to the *lex domicilii*, and the real, Conflict of Laws, 403, 404. The matter was merely ancillary, and the administrator would be to collect such of the avails of the same to citizens, as would be authorized of the estate of the deceased, and principal administration. *Davis v. Apprehend*, the uniform doctrine of more than that granted where the considered as an ancillary administration. 256. Such ancillary administration here for assets received in the though he had filed a copy of the petition in this Commonwealth. Selectors. 384. *Campbell v. Sheldon*, 13 and Marine, it is now contended that the amount, at the place of the ancillary of the deceased which was found at the principal administration, for the purpose of debts due to creditors in Massachusetts has been changed in its specific have been, by order of the Probate of defendant, Haven, in another and executor.

Counsel for the plaintiff, seems, as the principles which are recognized in well as other cases that may be Mass. 506; *Dawes v. Boylston*, 10 Pick. 78; *Vaughan v. Northup*,

generally sanctioned, that as to executor or administrator, acquired principal administration, he is to be held only to the legal tribunals of the jurisdiction where administration was taken.

sometimes raised, and which have been as to the authority of the to apply the property, received within of debts or legacies due to creditors jurisdiction.

counsel for the plaintiff upon the New York, in the case of *Campbell v. id.*, that if a foreign executor, coming

into that State, without filing a copy of the will and taking an appointment under the authority there, should intermeddle with the goods of the deceased in New York, and thus make himself an executor *de son tort*, he should also be charged with the assets remaining in his hands, though received in a foreign country. This decision, as well as the general question of conflicting administrators, is considered by Mr. Justice Story, in his learned commentaries on the Conflict of Laws, 424-429. He doubts the correctness of the decision in *Campbell v. Tousey*, and says "there is great difficulty in supporting it, to the extent of making the foreign executor or administrator liable, in such State, for assets received abroad and brought into the State by him. It is not easy to perceive how he can be sued in such State for assets in his hands received abroad under the sanction of a foreign administration, and by the authority of the foreign government to which he is accountable for all such assets."

It seems to be highly reasonable and proper that the accountability of the administrator, for all assets received under an appointment in one State, should be exclusively under the laws and judicial decisions of the State conferring upon him the power and authority to act in this behalf; and that all questions as to the faithful or unfaithful discharge of his duties as such administrator should be limited to the same local jurisdiction. If it were not so, obviously great confusion would arise, and conflicting decisions might be made, requiring inconsistent duties of the administrator. Nor can we think that the omission in the statutes of Louisiana, of the requisition of bonds from the administrator for the faithful discharge of his trust, can vary the general principle. The nature and extent of the security to be given in such cases must necessarily be regulated by the local law. We are to presume that such laws are in force in Louisiana, as furnish reasonable security to the parties in interest, and that in some form, through the aid of legal process, the avails of the estate of one deceased may be reached, or the executor be restrained in any attempt to withdraw the same, or to place himself beyond the jurisdiction of her courts, while his liabilities to creditors are undischarged. Indeed the records of the court of probate of New Orleans, in this case, and the civil code of Louisiana, to which we have been referred, both show various proceedings in the cases of settlement of estates, having for their object the proper application of the assets to the payment of the debts of deceased persons. The remedy, it is true, may be lost by delay or laches of the creditor in enforcing his claim, and the proceedings may be closed in a shorter time than would be consonant with the laws of Massachusetts; but this cannot affect the general principle as to the liabilities of the foreign administrator in our courts.

Upon the whole matter, the court are of opinion that the defendants are not liable upon this bond to the judge of probate in this county, for any assets received in the State of Louisiana; the property thus received, having been already administered upon in that State. If the

settlement of the estate is not closed there, proceedings may be instituted there against the legal representatives to enforce any valid claims existing on behalf of creditors. If not enforced in due time, the creditors may have lost their remedy by their own laches.

The books in possession of Harvard College were transmitted to the donees from Louisiana, and the estate at the place of principal administration being solvent, they were properly transmitted by the executors, agreeably to the bequest of the testator; and this being a proper and legal disposition of them under the authority and laws of Louisiana, they are not assets to be accounted for by the administrator in this Commonwealth.

The administrator is not to be charged with the real estate returned in the inventory, or be made liable by reason of any neglect to procure license to sell the same; this court having, upon an application duly made by him for such license, refused to grant it. *Livermore v. Haven*, 23 Pick. 116. The result is, therefore, that the plaintiff is entitled to a judgment for only nominal damages.¹

ADAMS v. BATCHELDER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1899.

[Reported 173 *Massachusetts*, 258.]

HOLMES, J. This is an action of contract brought upon a New Hampshire judgment obtained by a man domiciled in New Hampshire, upon a debt contracted in New Hampshire, against a resident of Massachusetts. The judgment creditor died, and the present plaintiff, also a resident of New Hampshire, was appointed his administratrix there. On April 18, 1881, the plaintiff was appointed ancillary administratrix in Massachusetts. On January 21, 1891, the defendant received a discharge in insolvency in Massachusetts. At the trial there was evidence that the debt never had been paid, but the judge ruled that the discharge was a bar to the action. The case is here upon an exception to that ruling.

The ruling raises the question whether the debt is to be regarded as due to a person resident in Massachusetts, within the meaning of Pub.

¹ *Acc. Preston v. Melville*, 8 Cl. & F. 1; *Lewis v. Grogard*, 17 N. J. Eq. 425; *Freeman's Appeal*, 68 Pa. 161; *Hamilton v. Carrington*, 41 S. C. 385, 19 S. E. 616 (but see *Cureton v. Mills*, 13 S. C. 409). Compare *Grant v. Reese*, 94 N. C. 720.

If without securing an appointment in another State an administrator takes assets there, it seems clear that he is accountable for the assets to the court which appointed him. *McPike v. McPike*, 111 Mo. 216, 20 S. W. 12. *Contra*, *Mothland v. Wireman*, 3 Pen. & W. 185. The sureties on his bond have also been held accountable for such assets. *Andrews v. Ivory*, 14 Grat. 229. *Contra*, *Fletcher v. Sanders*, 7 Dana, 345 (sureties of an ancillary administrator).

Sts. c. 157, § 81. The defendant's position is that, as the debt could not be collected except by taking out ancillary administration here, it must be taken to be due to the plaintiff in her capacity of ancillary administratrix, and not as a natural person; and that, as that office has its birth and life in Massachusetts, the plaintiff in that capacity has her residence here, just as a corporation has its domicile in the State which created it. *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Mass. 154. But this argument is working a fiction too hard. An executor or administrator is not a corporation sole. He gets his title or his succession to the rights of the deceased by his appointment, it is true. Nowadays he holds those rights in a fiduciary capacity, and he must account for what he receives. But there is no absolute separation of his artificial from his natural personality, as is shown by the fact that a suit against an executor may end in a judgment *de bonis propriis*, either at common law or under Pub. Sts. c. 166, § 10, and very frequently may lead to a personal judgment for costs, as also that in general his contracts as such bind him only personally, even when he is entitled to indemnity from the estate. *Durkin v. Langley*, 167 Mass. 577. A judgment recovered by an administrator is payable to him personally, and may be sued on by him in another State. *Talmage v. Chapel*, 16 Mass. 71. And it has been held that, when a chattel is taken from an administrator wrongfully, he may sue for it in another State into which it has been carried. *Crawford v. Graves*, 15 La. Ann. 243. Story, *Conf. of Laws*, § 515. Dicey, *Conf. of Laws*, 459, 460. See *Commonwealth v. Griffith*, 2 Pick. 11, 18. What is true of an executor is even more plainly true of an ancillary administrator. And as one person can have but one domicile, unless the law for this purpose treats the woman and the ancillary administratrix as two persons, the plaintiff is a resident of New Hampshire, since no one would contend that her residence was changed for all purposes by her merely accepting an appointment here.

In the present case there is also another consideration. The debt was not suspended until the appointment of the ancillary administratrix. It was the property of the principal administratrix so far that a payment to her would have been a bar to the present action: *Wilkins v. Ellett*, 9 Wall. 740; s. c. 108 U. S. 256; see Story, *Conf. of Laws*, § 515, n.; Dicey, *Conf. of Laws*, 461; or that the debt could have been sued for and collected there before the ancillary letters were issued, and that, if collected in Massachusetts, it would be transmitted to New Hampshire and accounted for there, unless there happened to be local claims against the estate. We presume that the right to sue the debtor in New Hampshire, if service could be got there, was not affected by the ancillary appointment. As is said in *Wilkins v. Ellett*, 108 U. S. 256, 258, the objection to the principal administratrix's bringing an action here "does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him."

See *Hutchins v. State Bank*, 12 Met. 421, 425; *Anthony v. Anthony*, 161 Mass. 843, 351, 352; *Swift, C. J.*, in *Slocum v. Sanford*, 2 Conn. 533, 535.

Perhaps this branch of the argument so far is not unanswerable. But there is the further fact that the debt already had been reduced to judgment. Whatever may be the law as to simple contract debts, it was laid down three centuries ago, and still is repeated, that judgments are *bona notabilia* where the judgment was given. As applied to this case, at least, we may accept the statement. *Sir John Needham's case*, in note to *Daniel v. Luker*, Dyer, 305; *Kegg v. Horton*, 1 Lutw. 399, 401; *Gold v. Strobe*, 3 Mod. 324; *Adams v. Savage*, *Ld. Raym.* 854; *Attorney-General v. Bouwens*, 4 M. & W. 171, 191; *Holcomb v. Phelps*, 16 Conn. 127, 135; 1 Wms. Saund. 274 *a*, n. 3. Taking all the elements into account, it seems to us that in this case, if ever, "the [administratrix] here is only the deputy or agent of the [administratrix] abroad." *Dawes v. Head*, 3 Pick. 128, 141, 142. See also *Merrill v. New England Ins. Co.*, 103 Mass. 245, 248.

Whichever of the foregoing lines of thought we pursue, we are led to the conclusion that the debt is not barred. If we treat the debt as due to the ancillary administratrix, we cannot so far distinguish between her natural and her artificial person, in the present state of the law, as to say that she resides in Massachusetts as administratrix when as a woman she resides in New Hampshire. If we are to consider the question of title more nicely, the debt belongs to the principal administratrix, although she may not receive it except subject to local debts of the estate.

Exceptions sustained.

STERN v. QUEEN.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1896.

[Reported [1896] 1 *Queen's Bench*, 211.]

THIS was a petition of right brought by the suppliants, executors of Baron Herman de Stern, for a return of the sum of £8,187, being the amount of probate duty paid upon certain shares in American railway companies, the certificates for which shares were in England at the testator's death.¹

WRIGHT, J. In this matter the case finds that the certificates, the value of which is in question in this petition of right, were documents of title held by the shareholders in certain foreign companies, which certificates certify that the person therein named is entitled to the number of shares named, and so forth. Upon every certificate there is

¹ This short statement is substituted for that of the Reporter. Arguments of counsel are omitted. — ED.

indorsed a form of transfer and a power of attorney in blank. Then paragraph 8 repeats with regard to this case most of the judicial statements of fact or inferences of fact which were drawn in the House of Lords in the case of *Colonial Bank v. Cady*, 15 App. Cas. 267. I think that the true inference to be drawn from the statements made in the case is that the duty has properly been claimed and paid upon these documents. It is not a matter that is susceptible of any lengthened statement; but the way I put it is this. There is in this country within the jurisdiction of the Ordinary (now the Probate Court) a document the existence of which vouches and is necessary for vouching the title of some one to the foreign share, so that in the absence of that document no one at all could establish a title to the share. It is found by the case that the certificates are currently marketable here as securities for that share and the dividends payable on that share; it is found, in fact, that the delivery of the certificate in this country *ipso facto* affects the title in a sense that it entitles the transferee to all the transferor's rights. It follows that the certificate itself has some operative power here, and it seems to me not to be within the ancient rule that a simple contract debt or mere evidences of a simple contract debt are supposed to exist only at the place of the debtor's residence. It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value in the hands of the executors within the jurisdiction of the Ordinary. Therefore I think that the Crown is entitled to succeed.

KENNEDY, J. I agree, and for the same reasons.

Judgment accordingly.

PINNEY v. MCGREGORY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[*Reported 102 Massachusetts, 186.*]

CONTRACT by the plaintiff as administrator of the estate of Rufus G. Pinney, late of Stafford in the State of Connecticut, upon several promissory notes made by the defendants, payable to the order of the intestate and overdue. The notes were found in Connecticut after the death of the intestate. The plaintiff was appointed administrator by the probate court for the county of Hampden in this Commonwealth. One of the defendants was a resident of the county at the time administration was granted, but not at the death of the intestate. The judge at the trial ruled that no action could be maintained by the plaintiff because the probate court had no jurisdiction; and directed a verdict for the defendants. If this ruling was correct, judgment was to be entered

upon the verdict, otherwise the verdict to be set aside and judgment entered for the plaintiff.¹

GRAY, J. . . . We prefer to rest the jurisdiction of the Probate Court upon the residence of a debtor to the intestate in this county at the time of the grant of administration.

By the law of England, simple contract debts due to the deceased are *bona notabilia* in the diocese where the debtor resides.² It is said indeed in the text-books of approved authority, that the debtor must have resided there at the time of the intestate's death, though we do not find that this has been expressly adjudged. 1 Williams on Executors, 279, and authorities cited. The canons of 1 James I. (1603) upon the subject, however, speak of the deceased being "at the time of his death" possessed of goods and chattels or good debts in any other diocese or peculiar jurisdiction than that in which he died. Ib. 267, 268. But it is observable that, in the leading cases in the courts of common law, in which the administration granted in one county was declared void, the allegation was that the debtor resided in another county not only at the time of his death, but also ever since, or at the time of the grant of administration. *Yeomans v. Bradshaw*, Carth. 373; s. c. 3 Salk. 70, 164, 12 Mod. 107, Comb. 392, Holt, 42; *Hilliard v. Cox*, 1 Salk. 37; s. c. 2 Salk. 747, 1 Ld. Raym. 562, 3 Ld. Raym. 813. And in the case of *Yockney v. Foyster*, cited and ap-

¹ This short statement is substituted for that of the Reporter. Only so much of the opinion is given as deals with the subject of jurisdiction based on residence of the defendants. — Ed.

² A simple contract debt is assets where the debtor resides: *Arnold v. Arnold*, 62 Ga. 627; *Burbank v. Payne*, 17 La. Ann. 15; *Emery v. Hildreth*, 2 Gray, 228; *Sayre v. Helme*, 61 Pa. 299; and this, though a bill or note has been given for the amount of it: *Yeoman v. Bradshaw*, Carth. 373, 3 Salk. 70; *Wyman v. Halstead*, 109 U. S. 654; *Slocum v. Sanford*, 2 Conn. 533; *Chapman v. Fish*, 6 Hill 554; but see *McNamara v. McNamara*, 62 Ga. 200; *Thorman v. Broderick*, 52 La. Ann. 1298, 27 So. 735; *Goodlett v. Anderson*, 7 Lea, 289. So of a judgment debt. *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125; *Swancy v. Scott*, 9 Humph. 327; see *Du Val v. Marshall*, 30 Ark. 230. So of a claim to a share of the profits of a partnership. *Shaw's Estate*, 81 Me. 207, 16 Atl. 662 (*semble*); *Jones v. Warren*, 70 Miss. 227, 14 So. 25. So of a right to recover damages. *Hartford & N. H. R. R. v. Andrews*, 36 Conn. 213; *Missouri Pacific R. R. v. Lewis*, 24 Neb. 848; *contra*, *Jeffersonville R. R. v. Swayne*, 26 Ind. 477; *Perry v. S. J. & W. R. R.*, 29 Kan. 420.

A bond, on the other hand, is assets where it is found. *Daniel v. Luker*, Dyer, 305; *Barclift v. Treece*, 77 Ala. 528; *Beers v. Shannon*, 73 N. Y. 292; and see *Grant v. Rogers*, 94 N. C. 755. In *Cooper v. Beers*, 143 Ill. 25, 38 N. E. 61, it was held that notes and bonds found within a State were not "property in this State" within the meaning of a statute. See *Speed v. Kelly*, 59 Miss. 47.

Shares of stock in a corporation are usually held to be assets where the stock-books are kept. *Attorney-General v. New York Breweries Co.*, [1898] 1 Q. B. 205; *Grayson v. Robertson*, 122 Ala. 330, 25 So. 229; *Arnold v. Arnold*, 62 Ga. 627; *Washburn's Estate*, 45 Minn. 242, 47 N. W. 790 (*semble*). In *Russell v. Hooker*, 67 Conn. 24, 34 Atl. 711, they were held to be assets at the domicile of the deceased, where they were found.

In *Epping v. Robinson*, 21 Fla. 36, bills and notes and written contracts were held *bona notabilia* where found. — Ed.

proved by Sir John Nicholl in *Scarth v. Bishop of London*, 1 Hagg. Eccl. 636, 637, in which the only effects within the province were brought there after the death of the party, Sir William Wynne held that, if the court of chancery had held a grant of probate there to be necessary in order to file a bill in equity to recover the property, the ecclesiastical court "in aid of justice" might grant letters of administration.

Our statute declares that "the Probate Court for each county shall have jurisdiction of the probate of wills, granting administration of the estates of persons who at the time of their decease were inhabitants of or resident in the county, and of persons who die without the State, leaving estates to be administered within such county." Gen. Sts. c. 117, § 2. It does not in terms say "leaving estate in such county at the time of their decease." The section embodies the Rev. Sts. c. 64, § 3, and c. 88, § 5, which were substantial re-enactments of the St. of 1817, c. 190, §§ 1, 16. In *Picquet, Appellant*, 5 Pick. 65, the court held that the earliest of these statutes should receive a liberal construction to enable the representatives of deceased foreign creditors to collect the debts of the deceased here in the only way in which by our laws they could be recovered, that is to say, through the power of administration granted by the laws of this Commonwealth; and that a debt due from a citizen of this Commonwealth to a foreign subject at the time of his death should therefore be deemed estate left by him in this Commonwealth, within the meaning of that statute. The same rule of construction must be applied to this case.

Indeed the St. of 1817, c. 190, § 16 (which included the estates of intestates already deceased, as well as of those who might die in the future), would seem to point to the time of a petition for administration rather than the time of the death, as the time at which there must be estate within the county, in order to give jurisdiction; for the words are, "when any person who has died or shall die intestate without the Commonwealth shall leave estate of any description within the same to be administered," letters of administration may be applied for as if he had died within the Commonwealth, and the judge of probate of any county "wherein such estate shall be found" shall have power to grant them. But it is not necessary to rely upon so narrow an argument.

Before that statute, the probate courts of the Commonwealth exercised the jurisdiction of granting administration on property belonging or debts due to persons residing abroad, in order to enable them to be collected in this State, because without such appointment no suit could be brought in our courts for the assets or debts of the deceased, either in the courts of the Commonwealth or of the United States. *Goodwin v. Jones*, 3 Mass. 514; *Stevens v. Gaylord*, 11 Mass. 256; *Picquet v. Swan*, 3 Mass. 469; *Noonan v. Bradley*, 9 Wall. 394. In *Dawes v. Boylston*, 9 Mass. 337, and *Wheelock v. Pierce*, 6 Cush. 288, it seems to have been assumed that a debtor or goods of the intestate coming or being brought into the Commonwealth after the death of the testator would give jurisdiction to support an administration. The

dictum of Mr. Justice Bigelow in *Bowdoin v. Holland*, 10 Cush. 18, that "it is undoubtedly true that if the deceased had at the time of his death neither domicile nor assets within the Commonwealth, the judge of probate had no jurisdiction in the premises," is not to be taken in its strictest sense. It was there held that *prima facie* evidence that a deceased nonresident had conveyed real estate in this Commonwealth in fraud of his creditors was sufficient to warrant the grant of administration here, even if no similar grant had been made in the State of his domicile; and the question asked by the learned judge upon that point is equally applicable to this. "If the will is never proved in the place of the testator's domicile, and is purposely withheld from probate, have creditors in this State no means of procuring administration on their deceased debtor's estate, and thereby reaching his property here?" To limit the power of granting administration to cases in which the goods are or the debtor resides in the Commonwealth at the time of the death of the intestate would be to deny to the creditors and representatives of the deceased, whether citizens of this or of another State, all remedy whenever goods are brought into this State, or a debtor takes up his residence here, after the death of the intestate. The more liberal construction of the statute is necessary to prevent a failure of justice.¹

WILKINS v. ELLETT.

SUPREME COURT OF THE UNITED STATES. 1883.

[Reported 108 *United States*, 256.]

GRAY, J. This is an action of assumpsit on the common counts, brought in the Circuit Court of the United States for the Western District of Tennessee. The plaintiff is a citizen of Virginia, and sues as administrator, appointed in Tennessee, of the estate of Thomas N. Quarles. The defendant is a citizen of Tennessee, and surviving partner of the firm of F. H. Clark & Company. The answer sets up that Quarles was a citizen of Alabama at the time of his death; that the sum sued for has been paid to William Goodloe, appointed his administrator in that State, and has been inventoried and accounted for by him upon a

¹ *Acc. Saunders v. Weston*, 74 Me. 85; *Low v. Horner*, 10 Hawaii, 531. So administration may be granted upon chattels brought into the State, whether rightfully or wrongfully, after the death of the owner. *Stearns v. Wright*, 51 N. H. 600; *In re Hughes*, 95 N. Y. 55; *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125 (*semble*); *Green v. Rugely*, 23 Tex. 539. *Contra*, *Embry v. Millar*, 1 A. K. Marsh, 300.

But where the property is taken into the foreign State by an agent of the domiciliary administrator for a temporary purpose, as for sale or transmission, the State into which it is taken can exercise no control over it as against the domiciliary administrator. *Crescent City Ice Co. v. Stafford*, 3 Woods 94, Fed. Cas. 3387; *Wells v. Miller*, 45 Ill. 382; *In re Schley's Estate*, 11 Phila. 139. This is clearly true where the goods are returned or sold before an ancillary administrator is appointed. *Christy v. Vest*, 36 Ia. 285; *Martin v. Gage*, 147 Mass. 204, 17 N. E. 310. — Ed.

final settlement of his administration ; and that there are no creditors of Quarles in Tennessee. The undisputed facts, appearing by the bill of exceptions, are as follows : —

Quarles was born at Richmond, Virginia, in 1835. In 1839 his mother, a widow, removed with him, her only child, to Courtland, Alabama. They lived there together until 1856, and she made her home there until her death in 1864. In 1856 he went to Memphis, Tennessee, and there entered the employment of F. H. Clark & Company, and continued in their employ as a clerk, making no investments himself, but leaving his surplus earnings on interest in their hands, until January, 1866, when he went to the house of a cousin in Courtland, Alabama, and while there died by an accident, leaving personal estate in Alabama. On the 27th of January, 1866, Goodloe took out letters of administration in Alabama, and in February, 1866, went to Memphis, and there, upon exhibiting his letters of administration, received from the defendant the sum of money due to Quarles, amounting to \$3,455.22 (which is the same for which this suit is brought), and included it in his inventory, and in his final account, which was allowed by the Probate Court in Alabama. There were no debts due from Quarles in Tennessee. All his next of kin resided in Virginia or in Alabama ; and no administration was taken out on his estate in Tennessee until June, 1866, when letters of administration were there issued to the plaintiff.

There was conflicting evidence upon the question whether the domicile of Quarles at the time of his death was in Alabama or in Tennessee. The jury found that it was in Tennessee, under instructions, the correctness of which we are not prepared to affirm, but need not consider, because assuming them to be correct, we are of opinion that the court erred in instructing the jury that, if the domicile was in Tennessee, they must find for the plaintiff ; and in refusing to instruct them, as requested by the defendant, that the payment to the Alabama administrator before the appointment of one in Tennessee, and there being no Tennessee creditors, was a valid discharge of the defendant, without reference to the domicile.

There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicile at the time of his death ; that the proper place for the principal administration of his estate is that domicile ; that administration may also be taken out in any place in which he leaves personal property ; and that no suit for the recovery of a debt due to him at the time of his death can be brought by an administrator as such in any State in which he has not taken out administration.

But the reason for this last rule is the protection of the rights of citizens of the State in which the suit is brought ; and the objection does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him.

If a debtor, residing in another State, comes into the State in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere. If the debtor being in that State, is there sued by the administrator, and judgment recovered against him, the administrator may bring suit in his own name upon that judgment in the State where the debtor resides. *Talmage v. Chapel*, 16 Mass. 71; *Biddle v. Wilkins*, 1 Pet. 686.

The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer, and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose in action to sue in his own name. *Harper v. Butler*, 2 Pet. 239; *Shaw, C. J.*, in *Rand v. Hubbard*, 4 Met. 252, 258-260; *Petersen v. Chemical Bank*, 32 N. Y. 21. And on a note made to the intestate, payable to bearer, an administrator appointed in one State may sue in his own name in another State. *Barrett v. Barrett*, 8 Greenl. 353; *Robinson v. Crandall*, 9 Wend. 425.

In accordance with these views, it was held by this court, when this case was before it after a former trial, at which the domicil of the intestate appeared to have been in Alabama, that the payment in Tennessee to the Alabama administrator was good as against the administrator afterwards appointed in Tennessee. *Wilkins v. Ellett*, 9 Wall. 740.

The fact that the domicil of the intestate has now been found by the jury to be in Tennessee does not appear to us to make any difference. There are neither creditors nor next of kin in Tennessee. The Alabama administrator has inventoried and accounted for the amount of this debt in Alabama. The distribution among the next of kin, whether made in Alabama or in Tennessee, must be according to the law of the domicil; and it has not been suggested that there is any difference between the laws of the two States in that regard.

The judgment must therefore be reversed, and the case remanded with directions to set aside the verdict and to order a *New trial*.¹

¹ *Acc. Selleck v. Busco*, 46 Conn. 370; *Citizens' Nat. Bank v. Sharp*, 53 Md. 521; *Dexter v. Berge*, 76 Minn. 216, 78 N. W. 1111; *Riley v. Moseley*, 44 Miss. 37; *Parsons v. Lyman*, 20 N. Y. 103; *Gray's Appeal*, 116 Pa. 256; 11 Atl. 66. *Contra*, *Vaughn v. Barret*, 5 Vt. 333. As against later claims of domestic creditors such payment is not a good discharge. *Ferguson v. Morris*, 67 Ala. 389.

But where an English company transferred shares of an American testator to his executor, the latter was held *executor de son tort* and liable to probate duty in England. *Attorney-General v. New York Breweries Co.*, [1898] 1 Q. B. 205. *Contra*, *Citizens' Nat. Bank v. Sharp*, 53 Md. 521. And where a foreign administrator took assets, he was held in an early case as *executor de son tort* in favor of the creditors. *Riley v. Riley*, 3 Day 74. See *Hopkins v. Town*, 4 B. Mon. 124. — Ed.

SHAKESPEARE v. FIDELITY INSURANCE, TRUST & SAFE
DEPOSIT CO.

SUPREME COURT OF PENNSYLVANIA. 1881.

[Reported 97 Pennsylvania, 173.]

THIS was an action of trover by the administrator *de bonis non, cum testamento annexo* of the estate of John B. Ackley deceased, against The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, for certain United States coupon bonds deposited with the defendants by the testator in his lifetime for safe-keeping on special certificate of deposit which by its terms must be surrendered upon withdrawal of the deposit. The testator left the certificate, at his death, in New Jersey, his domicile, and it was presented by the New Jersey executor to the defendant, and the bonds surrendered in exchange for it. The plaintiff having been appointed administrator in Pennsylvania, demanded the bonds, and upon refusal brought this suit. The court entered judgment for the defendant upon the point reserved, viz., Is the plaintiff entitled to recover upon these facts? The plaintiff took a writ of error.¹

SHARSWOOD, C. J. We do not consider that the United States coupon bonds which are the subjects of this controversy were, at the time of the death of the decedent, any part of his estate in this Commonwealth. The defendants were the mere depositaries of the bonds for safe-keeping. They were, therefore, in the possession of the decedent. He held the certificate of their deposit. The defendants were bound to restore the bonds at any time to the lawful holder of the certificate. It was as if the bonds had been placed in a fire-proof of the defendants, of which the decedent possessed the key. In point of fact, the certificate was in the actual possession of the widow of the decedent in New Jersey. She surrendered it as she was bound to do, to the foreign executor. She could not have withheld it. The New Jersey executor could have sued her, and compelled its delivery to him. The Pennsylvania administrator certainly could not. By the terms of the certificate it might be transferred by assignment indorsed thereon and approved by the company. The foreign executor could have so assigned it, and his assignee could have sued for the delivery of the bonds, in his own name. The assignment would have been a sale of the bonds, which were payable to bearer, and passed by delivery. Whoever showed a legal title to the certificate had a right to the possession of the bonds. The case, then, is within the principle of *Moore v. Fields*, 6 Wright, 471, where it was held that, where a debt fixed by a decree or judgment of the court of

¹ This short statement is substituted for that of the Reporter. Part of the opinion, in which the statute fixing the powers of foreign executors was held not to apply, is omitted. — Ed.

another State in favor of a foreign administrator, is due by citizens of Pennsylvania to the estate of a decedent, the administrator of the foreign domicil may sue for and recover it in his own name.

*Judgment affirmed*¹

AMSDEN v. DANIELSON.

SUPREME COURT OF RHODE ISLAND. 1895

[Reported 18 *Rhode Island*, 787.]

STINESS, J. The plaintiff, executor of the will of Lucretia C. Danielson, late of Providence, deceased, sues the defendant, a resident of Killingly, Connecticut, upon a promissory note, made by him, dated at said Killingly, and payable to the testatrix. The action was commenced January 12, 1894, by an attachment of real estate of the defendant in the city of Providence in this State. It appears by the defendant's plea that after said will was probated here, and since the commencement of this suit, a copy of the will was recorded in Killingly and William H. Chollar was appointed administrator, who has qualified, and to whom the defendant has made payment of the amount due on the note. To this the plaintiff replies that there was no property in Connecticut except a trifling amount of furniture, which had been fully administered by him before the application to record the will in Killingly; that there were no creditors in Connecticut; that the defendant, knowing the intention of the plaintiff to bring suit here, induced the plaintiff to forbear his suit by promising to pay the debt on a certain day, and thereupon, contriving to prevent said attachment and to evade the payment of the note, took advantage of the plaintiff's forbearance and procured the recording of the will and the appointment of Chollar as administrator in Connecticut; that the note is and has been, since the death of the testatrix, in the plaintiff's possession, upon which the defendant paid him the sum of \$234.20 in October, 1893, and that the defendant had notice of the attachment before he made the payment to Chollar as administrator. The defendant demurs to the replications.

The main question raised by the pleadings is whether under these circumstances the suit can be maintained in Rhode Island, after the payment to the administrator in Connecticut. We think it can be maintained. First the fact is set up that this was a voluntary and collusive payment, which upon demurrer must be taken to be true. While a party will be protected from paying a second time that which he has once in good faith been compelled to pay, it is clear that these facts do

¹ In *McCully v. Cooper*, 114 Cal. 258, 46 Pac. 82, where a foreign administrator having a certificate of deposit demanded payment and was refused, it was held to be his duty to surrender the certificate to the domestic administrator, that the latter might sue upon it. — Ed.

not make such a case. A person cannot oust the court of one State of jurisdiction by a collusive judgment, and much less by a voluntary payment, in another. So it has been held that where a man, by wilful default, has suffered judgment to go against him as garnishee, in another State, when he might have prevented it, a payment is no bar in the State where a suit upon the claim had been previously commenced. *Whipple v. Robbins*, 97 Mass. 107; *Wilkinson v. Hall*, 6 Gray, 568. See also *Hull v. Blake*, 13 Mass. 153, 157, and *Stevens v. Gaylord*, 11 Mass. 256.

Passing over the question whether the promise of the defendant made a new cause of action, about which there seems to be little room for doubt, we come, second, to the main question which has been argued, viz., whether the executor in Rhode Island can sue at all for the amount due upon the note. The argument is that the note was payable in Killingly, the domicile of the defendant, and hence its proceeds were assets in Connecticut and not in Rhode Island. This argument is sustained by *Pinney v. McGregory*, 102 Mass. 186; *Abbott v. Coburn*, 28 Vt. 663; and *Wyman v. Halstead*, 109 U. S. 654. Admitting that the note was payable in Killingly, the fact does not control this case. If it were necessary to bring suit upon it in Connecticut of course an administrator would be appointed there. But it does not follow that it cannot be collected elsewhere. The plaintiff having the note, and finding property of the defendant in this State, had as much right to proceed to collect it here, as though it had been his own debt. It would be a most absurd rule of law which would require him to go to another State, record the will, secure the appointment of an administrator and go through all the requirements of a probate court in order to bring a suit where possibly there might be no property, when he could attach property here and secure his judgment without trouble. The cases cited by the defendant do not hold this. *Slocum v. Sanford*, 2 Conn. 533, appears to have been a case where the defendant, in 1813, had proved his claim against the estate of the payee, before insolvent commissioners in Rhode Island, from which the amount of the note sued upon had been deducted and the administrator in Rhode Island had given him a discharge from it before the suit was brought in Connecticut, but certainly before the trial in 1816, wherein this fact was held to be a good defence. Undoubtedly the *bona fide* settlement of a debt with a foreign administrator is a bar. In *Stevens v. Gaylord*, 11 Mass. 256, the defendant had been appointed administrator in Connecticut before an administrator had been appointed and suit brought in Massachusetts. It is indeed held in both these cases that the debt was assets in the State where the debtor resided, and this is the point to which they are cited. But that is not the question before us. Assuming this to be so, the question is whether the administrator may collect the debt in another State if he has the chance to do so. Upon this question we have no doubt. It is well settled that a *bona fide* voluntary payment to a foreign administrator is a good discharge of a

debt: *Mackay v. Saint Mary's Church*, 15 R. I. 121; and if this be so, an involuntary judgment, based upon an attachment of property, cannot be less valid. As said by Wells, J., in *Merrill v. New England Ins. Co.*, 103 Mass. 245, 248: "Having possession of, and a legal title to, the instrument, or evidence of the demand, and finding the debtor or his property within the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached." The same doctrine was announced in *Perkins v. Stone*, 18 Conn. 270, 274, where debtors resident in Massachusetts were sued by an administrator in Connecticut. "Had it been necessary for the plaintiff to go into the State of Massachusetts to bring his action, it is conceded that he must have taken out letters there, to enable him to sue in his representative capacity. But as he is under no necessity of invoking the aid of the courts of that State, his case is not brought within the operation of the rule which precludes an administrator appointed in one State from suing in the courts of another." The case which comes most closely to opposing these cases is that of *Pond v. Makepeace*, 2 Met. 114. There, a Rhode Island administrator had brought suit in Massachusetts and obtained judgment by default, under which execution was levied on real estate, and it was sold in satisfaction of the judgment. It was held that the suit was no bar to a subsequent suit by a Massachusetts administrator, because the Rhode Island administrator had no power to sue in that State and so could pass no title to the real estate under the levy and sale. But that is not like this case. Here, the plaintiff is suing in Rhode Island, the State in which he holds his letters testamentary.

We see no reason why he may not so sue. The cases we have quoted from sustain the right and we know of none which deny it. The reason upon which the right is based is satisfactory and we therefore decide that the plaintiff has that right under the pleadings in this case.

The demurrers of the defendant in the plaintiff's replications are overruled.¹

¹ In spite of the doctrine that the existence of a promissory note given for a debt does not alter the situs of the debt, which is assets, for purpose of administration, at the domicile of the debtor, the courts appear to uphold a payment only to such administrator as can produce the note. Thus: 1. Payment to the administrator of the maker's State, without surrender of the note, is not a legal discharge as against the domiciliary administrator who has the note. *McCord v. Thompson*, 92 Ind. 565; *Amsden v. Danielson*, 19 R. I. 533, 35 Atl. 70 (affirming the decision above after withdrawal of the demurrer and rejoinder filed denying collusion); *St. John v. Hodges*, 9 Baxt. 334. See *Bull v. Fuller*, 78 Ia. 20, 42 N. W. 572, where payment to a domiciliary administrator without surrender of the note was upheld against the ancillary administrator with the note, on the ground that no creditor of the estate was interested, and "to compel a second payment, and require the debtor to seek repayment from the administrator in Vermont, when the money is already in the hands of a representative of the estate, merely in the interest of a double administration would indeed be a burlesque upon the administration of justice."

2. Payment to the domiciliary administrator who has not the note is not a legal

MERRILL v. NEW ENGLAND MUTUAL LIFE
INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[Reported 103 Massachusetts, 245.]

CONTRACT by the plaintiff as administrator of the estate of Howard M. Merrill, on a policy of insurance issued by the defendants upon the life of the intestate. The answer alleged that the defendants had been sued on the policy in Illinois by the administrator of Merrill appointed in that State. Merrill was domiciled in Illinois; the policy was pledged by him to the plaintiff as security for a loan which had not been paid. The defendant was a Massachusetts corporation.¹

WELLS, J. There can be no doubt that the appointment of the administrator in Massachusetts was legal and proper. A debt due to the intestate from any party having a domicile in this State, or any demand or right, requiring legal authority for its enforcement, is sufficient to give jurisdiction for such an appointment. Gen. Sts. c. 117, § 2; *Pinney v. McGregory*, 102 Mass. 186; *Picquet*, Appellant, 5 Pick. 65; *Emery v. Hildreth*, 2 Gray, 228. Such administration is auxiliary only, when the domicile of the intestate was elsewhere at the time of his decease, if there is an administrator at the place of domicile. It extends to all assets found within the State; and, within the jurisdiction where granted, it is exclusive of all other authority. The administrator appointed at the place of domicile of the deceased is the principal administrator; and personal securities, in the possession and control of the intestate at the time of his decease, vest in him. He can do no legal act for their collection in another jurisdiction, without an ancillary appointment there. And, if another has already been appointed auxiliary administrator, the collection can be made, within that jurisdiction, only through him. But the principal administrator may always dispose of or collect such securities, if he can do so without being obliged to resort to the domicile of the debtor. *Hutchins v. State Bank*, 12 Met. 421. Having possession of, and a legal title to, the instrument, or evidence of the demand, and finding the debtor or his property within

discharge as against the administrator of the maker's State who has the note. *Young v. O'Neal*, 3 Sneed, 55; and see *Riley v. Moseley*, 44 Miss. 37.

8. Payment to the domiciliary administrator who holds and surrenders the note is a good bar to a suit previously brought by the administrator of the maker's State who has not the note. *Thorman v. Broderick*, 52 La. Ann. 1298, 27 So. 735; *Goodlett v. Anderson*, 7 Lea, 286. See *McIlvoy v. Alsop*, 45 Miss. 365, where the administrator of the maker's State was allowed to foreclose a lien upon land in that State given to secure the payment of the note, though the note was in the hands of the foreign domiciliary administrator who refused to surrender it. — ED.

¹ This short statement of facts is substituted for that of the Reporter. Arguments of counsel are omitted. — ED.

the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached.

The appointment by the insurance company of a general agent, with authority to accept, in behalf of the principal, service of legal process in Illinois, subjects the defendant to the suit brought by the principal administrator in the courts of that State. *Gillespie v. Commercial Insurance Co.*, 12 Gray, 201. As that suit was first brought, and apparently embraces the whole cause of action, so that a judgment therein would merge all liabilities of the defendant upon the policy, we should be inclined to hold that it was exclusive of any other remedy, so that no action could be prosecuted in any other court upon the same contract at the same time, if the administrator in Illinois had then had the legal title and possession of the policy, or the absolute right of possession. *Whipple v. Robbins*, 97 Mass. 107; *Newell v. Newton*, 10 Pick. 470; *Wallace v. McConnell*, 13 Pet. 186; *Embree v. Hanna*, 5 Johns. 101; *American Bank v. Rollins*, 99 Mass. 313.

It is said by Mr. Justice Dewey in *Colt v. Partridge*, 7 Met. 574, that "whether a plea in abatement that another action between the same parties, and for the same cause, is pending in another State, is good, has not been decided here." It is also said by Mr. Justice Foster in *American Bank v. Rollins*, that the doctrine of that case and of *Wallace v. McConnell*, *Embree v. Hanna*, and *Whipple v. Robbins*, "constitutes an important exception to the ordinary rule that *lis pendens* in a foreign court is not a good plea."

The present case does not depend upon the ordinary rule in regard to *lis pendens*; nor is it within the exception to that rule, if the decisions, above referred to, do constitute an exception. The administrator in Illinois and the administrator in Massachusetts are not the same party. They are not even in privity with each other. *Low v. Bartlett*, 8 Allen, 259; *Ela v. Edwards*, 13 Allen, 48. The authority and right of each is independent and exclusive within the jurisdiction of his own appointment. If, therefore, the policy had been in the legal custody and control of the principal administrator, the institution of proceedings for the collection of its proceeds by him, in the courts of Illinois, and jurisdiction of the defendant or its property obtained thereon, would have been such an appropriation of the claim as a part of the assets of the estate subject to administration there, as would have excluded the ancillary administration from any authority over it.

But, upon the facts stated, we are satisfied that the intestate had parted with the possession of the policy, upon a valuable and legal consideration, in his lifetime; so that, at his decease, he had no right of possession, and none passed to his administrator, except subject to such rights as had been conferred by the pledge and delivery of the policy by the intestate to his uncle Thomas T. Merrill. The agreed statement shows a distinct and unequivocal pledge of the policy to

secure the intestate's note for seven hundred dollars, given for money lent to him by Thomas T. Merrill upon the assurance and condition that it should be so secured. The policy was delivered in pursuance of that agreement, and remained in the possession of Thomas T. Merrill until he was appointed administrator. This was sufficient to constitute a good pledge of the instrument, giving to the pledgee an equitable interest in the proceeds of it. Angell on Insurance, §§ 327-340; *Palmer v. Merrill*, 6 Cush. 282; *Dunn v. Snell*, 15 Mass. 481; *Currier v. Howard*, 14 Gray, 511.

In that state of facts, if the principal administrator had himself received the ancillary appointment in Massachusetts, he could not have reclaimed the policy from the hands of Thomas T. Merrill without payment of the note in redemption of the pledge. It is unnecessary to consider now, whether, beyond this, the claim of the parents of the intestate would be protected against the general interests of the estate. It is sufficient that there was a right of possession in Thomas T. Merrill, superior to that of the intestate or his administrator, and which he might pass over to the administrator in Massachusetts upon such terms as he saw fit, consistent with his limited rights. His interest in the policy is not a mere order for a part of the proceeds, but extends to the whole policy alike. With his concurrence the auxiliary administrator may maintain a suit and collect the proceeds of the policy. Without it neither he nor the principal administrator could control the possession or collect the proceeds. The pledge makes it no longer a question of jurisdiction, as affected by priority of suit, comity between the States, or otherwise, but one merely of the right of the respective parties claiming an interest in the policy. The right of the plaintiff in this suit is superior to that of the principal administrator in Illinois, because he represents the equitable interest and right of immediate possession and control of the pledgee, as well as the legal capacity to sue, which remains in the representatives of the estate of Howard M. Merrill. That legal right to sue is held by the administrators of Howard M. Merrill, wherever appointed, in trust for the benefit of the equitable assignee of the claim. The assignee is entitled to control any suit brought for its recovery. His right would be protected by the courts against any attempt of the administrators to collect or release the demand in disregard of his interests. *Jones v. Witter*, 13 Mass. 304; *Eastman v. Wright*, 6 Pick. 316; *Grover v. Grover*, 24 Pick. 261; *Rockwood v. Brown*, 1 Gray, 261; *Bates v. Kempton*, 7 Gray, 382. Upon the same principle, it would be equally protected against prejudice from any attempt to anticipate him by means of a suit instituted by such administrator in his own behalf and without recognition of the rights of the assignee. Within the same jurisdiction, the respective rights of the assignor and assignee may be readily adjusted, and suits controlled. The difficulty arises from the existence of suits in separate and independent jurisdictions. There is a class of decisions, referred to by the defendant, particularly affecting questions of jurisdiction between

the federal and State courts, to the effect that a subject-matter once brought within the jurisdiction of a court of general jurisdiction, whether by suit *in personam* or proceeding *in rem*, or even by process of attachment, is in the custody of that court, and cannot be withdrawn or controlled by any process or proceeding of any other court. But that doctrine is explained and narrowly limited by Mr. Justice Miller in *Buck v. Colbath*, 3 Wall. 334. It does not apply to this case, for reasons already indicated; because the policy, having been pledged and delivered to another in the lifetime of the intestate, was never in the legal possession of his administrator in Illinois, and therefore was never properly brought within the jurisdiction of the courts in that State, either as assets subject to administration, or as a cause of action which the administrator there could maintain. He could not, by commencing a suit there, transfer to those courts the determination of the rights of the pledgee, so as to compel him to seek them by intervening in such suit. The pledgee had an independent title, accompanied by possession of the policy; and by bill in equity in his own name, or by suit in the name of the administrator, in Massachusetts, could enforce his claim. Neither the administrator in Massachusetts nor the administrator in Illinois would be allowed to defeat the prosecution of such a suit. Against either administrator, seeking to collect the amount of the policy by other proceedings or means, the insurance company have a sufficient defence. That defence stands not merely upon the jurisdiction and judgment of the court, but equally well upon the title of the pledgee, yielded to by the insurance company without suit.¹ . . .

Upon the agreed statement, being satisfied that the plaintiff, as administrator of the intestate's estate in Massachusetts, and representing also the equitable interest and possessory right of the pledgee of the policy, is entitled to its control and collection, in preference to the principal administrator in Illinois, we feel bound to render judgment accordingly for the amount due from the defendant by the terms of the policy.

*Judgment for the plaintiff.*²

HARVEY v. RICHARDS.

CIRCUIT COURT OF THE UNITED STATES. 1818.

[Reported 1 *Mason*, 381.]

STORY, J. The question which has now been argued lies at the very foundation of the plaintiff's suit, and is of great importance and no in-

¹ Part of the opinion, in which the effect of the assignment is discussed, is omitted.—Ed.

² But see *Steele v. Conn., Gen. L. I. Co.*, 31 App. Div. 389, 52 N. Y. Supp. 373 (affirmed 160 N. Y. 703). A New York man whose life was insured in a Connecticut company pledged his policy to the company in Connecticut and died. His administrator in New York brought suit; then the company voluntarily paid the Connecticut administrator. This payment was held no bar to the New York suit.—Ed.

considerable difficulty. I have taken time to consider it; and after a full consideration of all the authorities, commented on with so much learning and ability by the counsel, I am now to pronounce the result of my own judgment on the case.

For the purposes of the argument, it is assumed or conceded that the testator (dying intestate as to the residue of his estate, of which distribution is now sought) was at his decease domiciled at Calcutta, in the East Indies; that his will has been duly proved, and administration there taken upon his estate by his executor; that the defendant has under the directions of that executor taken administration of the testator's estate in Massachusetts, and in virtue thereof has received a large sum of money, which now remains in his hands; that no part of this money is wanted at Calcutta for the payment of any debts or legacies under the will; and that the plaintiff is a citizen of Rhode Island, and domiciled there; and as one of the next of kin of the testator is entitled to a moiety of the undivided residue of the testator's estate. The question then is, whether, under these circumstances, this court as a court of equity can proceed to decree an account and distribution of the property so in the hands of the defendant, or is bound to order it to be remitted to Calcutta, to be distributed by the proper tribunal there.

There are some points involved in the argument which may be disposed of in a few words. In the first place the distribution, whether made here or abroad, must be according to the law of the place of the testator's domicile. This, although once a question vexed with much ingenuity and learning in courts of law, is now so completely settled by a series of well considered decisions, that it cannot be brought into judicial doubt. In the present case, the law of Calcutta, or rather of the province of Bengal, is, as I apprehend, the law of England; and as that is the same as the law of Massachusetts, the distribution would be the same as if the testator had died domiciled here. In the next place, the court of chancery has an ancient and settled jurisdiction to decree an account and distribution of a testator's and an intestate's estate, on the application of the legatees or next of kin; and supposing this to be a fit case for the application of its authority, the present suit would fall completely within that jurisdiction. In the next place, the equity powers and authorities of the courts of the United States are, in cases within the limits of their constitutional jurisdiction, co-equal and co-extensive, as to rights and remedies, with those of the court of chancery. The present is a suit between citizens of different States over whom this court has an unquestionable right to entertain jurisdiction; and it will follow of course, that the plaintiff is entitled to the relief she prays for, if it be competent and proper for any court of equity to grant it.

Having disposed of these preliminary points, we may now return to the consideration of the great question in controversy. Stated in broad terms it comes to this, whether a court of equity here has competent

authority to decree distribution of intestate property collected under an administration granted here, the intestate having died domiciled abroad, and the distribution being to be made according to the law of his foreign domicile. The counsel for the defendant deny such authority, under any circumstances; the counsel for the plaintiff as strenuously assert it.

This is a question involving the doctrines of national comity, or, what may be more fitly termed, international law. And looking to it as a question of principle, it would not seem to be attended with any intrinsic difficulty. The property is here, the parties are here, and the rule of distribution is fixed. What reason then exists why the court should not proceed to decree according to the rights of the parties? Why should it send our own citizens to a foreign tribunal to seek that justice which it is in its own power to administer without injustice to any other person? I say without injustice, because it may be admitted that a court of equity ought not to be the instrument of injustice, and that if in the given case such would be the effect of its interposition, it ought to withhold its arm. This, however, would be an objection, not to the general authority, but to the exercise of it under particular circumstances. The argument, however, goes the length of denying the existence of that authority, whatever may be the circumstances of the case. Yet cases may be readily imagined in which it might not be inequitable to interfere, nay, in which there might be very cogent reasons for interference. Suppose there are no debts abroad, and no heirs or legatees abroad, but all are here, and apply to the court for a decree of distribution, is the court bound to remit for the vain purpose of putting the legatees or distributees to great expense and delay in seeking their rights in a foreign tribunal? Suppose two executors are appointed by the testator, one abroad and one here (and such cases are not uncommon), and the bulk of the property is collected here, and all the legatees are here, shall the court direct the domestic executor to remit the whole property to the foreign executor because it is to be distributed according to the law of the foreign domicile? Suppose further, the executor here is himself the residuary legatee, or, in case of intestacy, the administrator here is the next of kin and entitled to the surplus, shall he be required to remit the property abroad, that he may be there decreed to receive it again? Suppose legacies, payable out of particular funds here, or a specific legacy of property here, shall not the legatee be entitled to recover of the administrator or executor here, because the testator was domiciled in a foreign country? Suppose a legacy to charitable uses in this country, good by our law, but which, from motives of policy, the courts of the foreign country decline to enforce, shall it be said that our courts are bound to enforce, by remitting the property there, a policy by which they are injured? Whatever may be thought of the last case, there can be no doubt that the others present circumstances where equity would strongly persuade us that it would be the duty of our courts to entertain jurisdiction and decide

on the rights of the parties. There are many other cases in which it would seem fit to vindicate and assert the proper rights of our own citizens and our own laws. This very case, under one aspect, would have presented a question of which our own tribunals might as justly have claimed an exclusive cognizance, and which, I trust, they would have decided with as much impartiality as the tribunals of the testator's domicile. Major Murray was an American citizen, born in Rhode Island; and if he left no lawful heirs (as has been argued in a former part of this case) his property here, supposing he had acquired no foreign domicile, would have undoubtedly fallen as an escheat to that State; and it would deserve consideration whether the change of domicile would work any alteration in that respect. Under such circumstances, would it be proper to send the State of Rhode Island to solicit its rights from a foreign tribunal in the East Indies?

One objection urged against the exercise of the authority of the court is, that as national comity requires the distribution of the property according to the law of the domicile, the same comity requires that the distribution should be made in the same place. This consequence, however, is not admitted; and it has no necessary connection with the preceding proposition. The rule, that distribution shall be according to the law of the domicile of the deceased is not founded merely upon the notion that movables have no situs, and therefore follow the person of the proprietor, even interpreting that maxim in its true sense, that personal property is subject to that law which governs the person of the owner. Nor is it, perhaps, founded upon the presumed intention of the deceased, that all his property should be distributed according to the law of the place of his domicile with which he is supposed to be best acquainted and satisfied; for the rule will prevail even against the express intention of the deceased, unless the mode in which that intention is expressed would give it legal validity as a will. It seems, indeed, to have had its origin in a more enlarged policy, founded upon the general convenience and necessities of mankind; and in this view the maxim above stated flows from, rather than guides, the application of that policy. The only reason why any nation gives effect to foreign laws within its own territory is the endless embarrassment which would otherwise be introduced in its own intercourse with foreign nations. The rights of its own citizens would be materially impaired, and, in many instances, totally extinguished, by a refusal to recognize and sustain the doctrines of foreign law. The case now under consideration is an illustration of the perfect justice and wisdom of this general practice of nations. A person may have movable property and debts in various countries, each of which may have a different system of succession. If the law *rei sitæ* were generally to prevail, it would be utterly impossible for any such person to know in what manner his property would be distributed at his death, not only from the uncertainty of its situation from its own transitory nature, but from the impracticability of knowing, with minute accuracy, the law of succession of every

country in which it might then happen to be. He would be under the same embarrassment if he attempted to dispose of his property by a testament; for he could never foresee where it would be at his death. Nay more, it would be in the power of his debtor, by a mere change of his own domicile, to destroy the best digested will; and the accident of a moment might destroy all the anxious provisions of an excellent parent for his whole family. Nor is this all. The nation itself to which the deceased belonged might be seriously affected by the loss of his wealth from a momentary absence, although his true home was in the centre of its own territory. These are great and serious evils pervading every class of the community, and equally affecting every civilized nation. But in a maritime nation, depending upon its commerce for its glory and its revenue, the mischief would be incalculable. The common and spontaneous consent of nations, therefore, established this rule from the noblest policy, the promotion of general convenience and happiness, and the avoiding of distressing difficulties, equally subversive of the public safety and private enterprise of all. It flowed from the same spirit that dictated judicial obedience to the foreign commissions of the admiralty. *Sub mutuae vicissitudinis obtentu, damus petimusque vicissim*, is the language of the civilized world on this subject. There can be no pretence that the same general inconvenience or embarrassment attends the distribution of foreign effects according to the foreign law by the tribunals of the country where they are situate. Cases have been already stated in which great inconvenience would attend the establishment of any rule excluding such distribution. It may be admitted also, that there are cases in which it would be highly convenient to decline the jurisdiction and remit the parties to the *forum domicilii*. Where there are no creditors here, and no heirs or legatees here, but all are resident abroad, there can be no doubt that a court of equity would direct the remittance of the property upon the application of any competent party.

The correct result of these considerations upon principle would seem to be, that whether the court here ought to decree distribution or remit the property abroad, is a matter, not of jurisdiction, but of judicial discretion, depending upon the particular circumstances of each case. That there ought to be no universal rule on the subject, but that every nation is bound to lend the aid of its own tribunals for the purpose of enforcing the rights of all persons having title to the fund, when such interference will not be productive of injustice or inconvenience, or conflicting equities.

It is farther objected, that a rule which is to depend for its application upon the particular circumstances of each case, is too uncertain to be considered a safe guide for general practice. But this objection affords no solid ground for declining the jurisdiction, since there is an infinite variety of cases in which no general rule has been or can be laid down, as to legal or equitable relief, in the ordinary controversies before judicial tribunals. In many of these the difficulty is intrinsic in

the subject-matter ; and where a general rule cannot easily be extracted, each case must, and indeed ought to, rest on its own particular circumstances. The uncertainty, therefore, is neither more nor less than belongs to many other complicated transactions of human life where the law administers relief *ex æquo et bono*.

Another objection, addressed more pointedly to a class of cases like the present, is the difficulty of settling the accounts of the estate, ascertaining the assets, what debts are sperate, what desperate, and, finally, ascertaining what is the residue to be distributed, and who are the next of kin entitled to share. And to add to our embarrassment, we are told that we cannot compel the foreign executor to render any account in our courts. I agree at once that this cannot be done if he is not here ; but I utterly deny that the administrator here cannot be compelled to account to any competent court for all the assets which he has received under the authority of our laws. And if the foreign executor chooses to lie by, and refuses to render any account of the foreign funds in his hands, so far as to enable the court here to ascertain whether the funds are wanted abroad for the payment of debts or legacies or not, he has no right to complain if the court refuses to remit the assets and distributes them among those who may legally claim them. And as to settling the estate, or ascertaining who are the distributees, there is no more difficulty than often falls to our lot in many cases arising under the ordinary probate proceedings.

All these objections are, in fact, reasons for declining to exercise the jurisdiction in particular cases, rather than reasons against the existence of the jurisdiction itself. It seems, indeed, admitted by the learned counsel for the defendant, that if there be no foreign administration, it would be the duty of the court to grant relief upon an administration taken here. Yet every objection already urged would apply with as much force in that as in the present case. The property would be to be distributed according to the foreign law of the deceased's domicile. The same difficulty would exist as to ascertaining the debts and legacies, and the assets and distributees entitled to share. But it is said in the case now put, the administration here would be the principal administration, whereas in the case at bar it is only an auxiliary or ancillary administration. I have no objection to the use of the terms principal and auxiliary, as indicating a distinction in fact as to the objects of the different administrations ; but we should guard ourselves against the conclusion that therefore there is a distinction in law as to the rights of parties. There is no magic in words. Each of these administrations may be properly considered as a principal one, with reference to the limits of its exclusive authority ; and each might, under circumstances, justly be deemed an auxiliary administration. If the bulk of the property and all the heirs and legatees and creditors were here, and the foreign administration were only to recover a few inconsiderable claims, that would most correctly be denominated a mere auxiliary administration for the beneficial use of the parties here,

although the domicil of the testator were abroad. The converse case would of course produce an opposite result. But I am yet to learn what possible difference it can make in the rights of parties before the court whether the administration be a principal or an auxiliary administration. They must stand upon the authority of the law to administer or deny relief, under all the circumstances of their case, and not upon a mere technical distinction of very recent origin.

I have already intimated my opinion as to the true principle that ought to regulate cases of this nature; and I have endeavoured to answer the most pressing objections satisfactorily at least to my mind. If, therefore, the question were *res integra*, I should have no difficulty in deciding that whether distribution ought or ought not to be decreed should depend upon the circumstances of each case; that no universal rule ought to be laid down on the subject; or at least, that the rule should be flexible, and depend for its application upon the equity of the particular case presented to the court. . . .¹

I have made some researches in the works of foreign jurists for the purpose of ascertaining what is the practice of nations governed by the civil law. Those researches have not been very satisfactory; but they leave little room to doubt that foreign tribunals sustain suits to enforce distribution of assets collected there under auxiliary administrations upon the doctrines so familiar in those courts, that the *situs rei*, as well as the presence of the party, confers a competent jurisdiction. 2 Hub. p. 2, lib. 5, tit. 1, § 43; 1 Hub. p. 1, lib. 3, tit. 13, § 20, *sub finem*; 1 Domat, 531, note; Constit. Frederii. Imp., tit. 1, § 10; Bynk. Quest. Priv. Jur., lib. 1, ch. 16.

Upon the whole my judgment (though delivered with the greatest deference for a different judgment entertained by others) is, that a court of equity here has authority to decree distribution in cases like the present, according to the *lex domicilii*, upon the application of the legatees or the next of kin or other competent parties; that whether it will decree distribution must depend upon the circumstances of each case; and that it is incumbent on those who resist the distribution to establish in the given case, that it may work injustice or public mischief. This doctrine is, as I think, sustained by principles of public policy, and is perfectly consistent with international comity. It stands also commended by its intrinsic equity; and although the authorities are not uniformly in its favor, yet they leave the court at liberty to pronounce that judgment which, if the question were entirely new, it would be disposed to entertain. *Vide* Toller's Law of Executors, 387; 1 Woodes Lect. 384, 385.²

¹ The learned judge here examined several Massachusetts and English cases. — Ed.

² *Acc.* Ewing v. Orr Ewing, 10 App. Cas. 453; Fretwell v. McLemore, 52 Ala. 124; Gibson v. Dowell, 42 Ark. 164 (*semble*); Casilly v. Meyer, 4 Md. 1; Succession of Gaines, 46 La. Ann., 14 So. 602; Parsons v. Lyman, 20 N. Y. 103; *In re* Hughes, 95 N. Y. 55; Carr v. Lowe, 7 Heisk. 84; Porter v. Heydock, 6 Vt. 374; Moses v. Hart, 25 Grat. 795; Estate of Youmans, 10 Hawaii, 207. *Contra*, Richards v. Dutch, 8 Mass.

EMERY v. BATCHELDER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[Reported 132 Massachusetts, 452.]

MORTON, C. J. This is a bill to require the defendants, as executors of the will of Daniel Austin, to reserve and set apart out of the estate of said Austin a fund sufficient to pay the plaintiff an annuity of four hundred dollars a year, given to her by the will.

It appeared at the hearing that the testator was a citizen of the State of Maine; that he died in December, 1877, in Kittery in that State; that his will was duly proved there in March, 1878, and the defendants were duly appointed and qualified as executors; that the defendants, who are residents of this Commonwealth, proved, in June, 1878, the will in the Probate Court for the county of Suffolk, and ancillary letters testamentary were issued to them; that, in October, 1880, the said executors filed their final account in the Probate Court for Suffolk County, showing that the balance in their hands was paid to said executors as executors under the appointment of the Probate Court in Maine, which account was allowed.

It also appeared that the estate now in their hands as such executors is not sufficient to pay all the legacies in full; and the question which the plaintiff desires to raise by this bill is, whether the annuity given to her is to abate in common with the other legacies, or is to be paid in full in preference to them.

It is too well settled, as a general rule, to admit of any doubt, that an executor or trustee appointed by judicial decree of a court of another State is accountable only in the courts of that State for the due execution of the trust, and the trust cannot be enforced in this Commonwealth, although the executor or trustee resides here. *Jenkins v. Lester*, 131 Mass. 355, and cases cited.

The plaintiff contends that this case is taken out of the general rule by the fact that the will was proved here, and ancillary letters testamentary issued to the defendants. Whether, if the defendants had now in their hands as such ancillary executors any balance for which they are liable to account to the Probate Court of Suffolk County, this court could and would entertain jurisdiction of a bill like this, which affects the rights of all the other legatees and the marshalling and distribution

506. In Pennsylvania there appear to be two lines of authority. One line holds that the court of ancillary administration must transmit the balance to the court of principal administration for final distribution. *Appeal of Barry*, 88 Pa. 131. The other line holds that such transmission is discretionary with the court. *Welles's Estate*, 161 Pa. 218, 23 Atl. 1116. These conflicting authorities have not been reconciled. *Laughlin v. Solomon*, 180 Pa. 177, 180.

The court should not retain the balance until it is satisfied that the foreign assets are sufficient to pay all claims against the estate. *Hutton v. Hutton*, 40 N. J. Eq. 461; *Hamilton v. Levy*, 41 S. C. 374, 19 S. E. 610. — ED.

of the whole estate, is a serious question which we are not required to consider. The defendants have not in their hands any funds as executors appointed in this State. They have transmitted the balance of the estate which was in their hands as such executors to themselves as executors in Maine, and this has been allowed and approved by the Probate court of Suffolk County.

Our statutes provide that, where ancillary administration is taken out in this State, upon the settlement of the estate, after the payment of the debts for which it is liable in this State, the residue of the personal estate may be distributed according to the will, "or in the discretion of the court it may be transmitted to the executor or administrator, if there is any, in the State or country where the deceased had his domicile, to be disposed of according to the laws thereof." Gen. Sts. c. 101, §§ 38, 39.

The allowance of the final account, in which the defendants credited themselves with the residue in their hands as paid to the executors in Maine, was in effect an order of the court that such residue should be transmitted to the defendants as principal executors appointed in Maine. If the executors in the two States had been different persons, it is clear that the executors here could not be held accountable in our courts after they had, under an order of the Probate Court, transmitted the balance in their hands to the executors in Maine. They then would have fully administered the estate here, and there would be nothing upon which a decree of the court here could act.

The principle is the same where the executors in the two States are the same persons. They act in each State in a different capacity, and are in law regarded as different persons. When the defendants acting as executors in Massachusetts transmitted the estate in their hands, as such executors, to themselves, acting as executors in Maine, they had performed all their duties in Massachusetts, and were no longer accountable as executors here. They thereby placed the whole of the estate of the testator within the jurisdiction and control of the courts of Maine, and are accountable for it there. We are of opinion that this jurisdiction is exclusive, and that this court cannot entertain a bill in equity, for the purpose of construing the will and marshalling and distributing the estate.

Bill dismissed.

COWDEN v. JACOBSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1896.

[Reported 165 Massachusetts, 240.]

MORTON, J. This is an appeal by an administrator from a decree of the Probate Court in Worcester County disallowing certain items in his

account. At the hearing before the Chief Justice, the appellee desired to contest other items in the account besides those involved in the appeal of the administrator, but the court ruled that it was not open to her to contest other independent items. The appellee does not question now the correctness of the ruling, and we think that it clearly was right. *Boynton v. Dyer*, 18 Pick. 1; *Harris v. Harris*, 153 Mass. 439.

The principal matter in dispute relates to the disallowance of the payment by the administrator of a note held against the intestate at her decease by Walter B. Chase of Sutton in this State, an heir at law. The intestate lived in Connecticut, where she possessed real and personal estate. She also possessed real estate in Sutton. The appellant, who lives in Worcester, was appointed administrator in both States. The next of kin were Walter B. Chase aforesaid, a brother, and one Hattie H. Jacobson of Portland, Maine, a half sister. By the laws of Connecticut kindred of the whole blood take to the exclusion of the half blood. There were debts of the intestate in this State, consisting of the note to Chase, and of unpaid taxes on the estate in Sutton. During the settlement of the estate in Connecticut the note was presented by Chase to the judge of probate, as it is provided by the Connecticut statutes may be done with claims when the administrator lives out of the State (Gen. Sts. of Conn. of 1888, § 582), and he, on learning that there was estate of the deceased in this Commonwealth, declined to allow it on the same grounds as debts due Connecticut creditors, and the note was not allowed, and does not seem to have been presented again to that court. Subsequently the administrator in Connecticut, having settled his account with the estate in the Probate Court there, and having in his hands for distribution, as appeared from said account, \$1,425.13 in personal estate, was ordered by the Probate Court under the statute for such cases made and provided (Gen. Sts. of Conn. of 1888, § 628) to pay the same to said Chase as the heir-at-law, and did so. The estate in Sutton was sold by the administrator pursuant to license from the Probate Court, and the note was paid out of the proceeds. The appellee, who was a minor, had notice of the petition to sell the real estate in Sutton, and also of the action of the court in Connecticut in regard to distribution, but made no objection to the proceedings until the administrator presented his account for allowance to the Probate Court of Worcester County.

The appellee contends that the note should have been paid by the administrator out of the personal estate in Connecticut, and she relies on *Livermore v. Haven*, 23 Pick. 116, and also on *Fay v. Haven*, 3 Met. 109, where another question growing out of the same controversy was considered. But in *Livermore v. Haven*, as was observed in substance in *Prescott v. Durfee*, 131 Mass. 477, the question was whether the court in its discretion should grant a license under the circumstances to sell real estate in this Commonwealth for the payment of debts. In this case the license has been granted by a court of com-

petent jurisdiction, after due notice, and the sale has been made, and neither those proceedings nor the validity of the appointment of the administrator can now be attacked collaterally by the appellee. *Pierce v. Prescott*, 128 Mass. 140. It does not appear that the payment by the administrator was not made in good faith, or that there was any collusion between him and Chase in regard to the settlement of the estate in Connecticut, or the sale here.

If there were collusion or bad faith the case might stand differently. *Stevens v. Gaylord*, 11 Mass. 256, 266. The distribution of the estate in Connecticut was made under an order of the Probate Court, which has not been impeached in any respect. The administrator was bound to comply with it, and for aught that appears would have been liable to a suit on his bond if he had failed to do so. Though administrator of both estates, he could not have been compelled to apply the personal property in Connecticut to the payment of debts here, nor have been held accountable for it here. *Boston v. Boylston*, 2 Mass. 384; *Hooker v. Olmstead*, 6 Pick. 481; *Fay v. Haven*, 3 Met. 109, 114; *Wheelock v. Pierce*, 6 Cush. 288; *Norton v. Palmer*, 7 Cush. 523. If it was necessary, in order to justify the payment of the note out of the proceeds of the real estate sold here, for the administrator to show that the creditor had used some diligence to collect the note out of the personal estate in Connecticut, and that he had met with some legal impediment there, we think it sufficiently appears that he had done so. He presented his claim to the proper tribunal, which declined to allow it except subject to the priorities of Connecticut creditors. It certainly would be going very far to hold that, under such circumstances, he was bound to wait upon and follow the settlement of the Connecticut estate, instead of resorting to the real estate here.

In *Prescott v. Durfee*, *ubi supra*, it was held that a Massachusetts creditor of a New York intestate, who died possessed of real estate here but no personal estate, might procure the appointment of an administrator in this State, and attach the real estate to recover the payment of his demand. It appeared that an administrator had been appointed in New York, and that there was personal estate there more than sufficient to pay all the debts, and there was nothing to show that the creditor had made any effort to collect his debt out of the personal estate in New York. But neither fact appears to have been regarded as material.¹

If there had been different administrators in Connecticut and Massachusetts, and the same course had been pursued by them in regard to the respective estates that has been followed by the present administrator, we presume that it hardly would be contended that the payment of Chase's note by the administrator in this State should be disallowed. We do not see that it makes any difference on principle that the same person was administrator in both jurisdictions. As already ob-

¹ *Acc. Rosenthal v. Renick*, 44 Ill. 202; and see *Hobson v. Payne*, 45 Ill. 158; *In re Gable's Estate*, 79 Ia. 178, 44 N. W. 352. — Ed.

served, he is not accountable here by reason of that fact for the estate in Connecticut. See *State v. Osborn*, 71 Mo. 86. If he has not administered the estate in Connecticut according to law, doubtless he is liable there upon his bond. This court cannot revise his actions as administrator of that estate. *Jennison v. Hapgood*, 10 Pick. 77, 101. If he has administered it according to law, still less can his conduct be made the foundation of liability by reason of the payment of Chase's note out of the proceeds of the real estate in Sutton. The appellee's contention would seem to go the length of requiring him to maintain that, although the administrator administered the estate in Connecticut in good faith, and distributed it according to the direction of the court having jurisdiction of it, the payment of Chase's note should be disallowed because the administrator did not see that it was paid out of the personal estate in Connecticut. If that be so, then, without adverting to other considerations, the converse of the proposition must be equally true; namely, that the creditor was bound to obtain payment out of the personal estate in Connecticut, and had no right to resort to the real estate here, which would be at variance with *Prescott v. Durfee, ubi supra*. We do not think that either proposition can be maintained when applied to the circumstances of this case. It is not contended that it was the duty of the administrator in Connecticut to see that creditors presented their claims and were paid out of the personal estate there, and we assume that he committed no breach of his bond by failing to do so, or to appeal from the ruling of the Probate Court disallowing the note. In the absence of personalty in this State, the real estate constituted a fund for the payment of debts here. The administrator was not bound to see that either estate was exonerated at the expense of the other. He was required to administer and dispose of each estate in good faith according to the law of the State where it was situated. In respect to this item there is nothing to show that he has not done so. We think that the payment to Chase should have been allowed.

The two remaining items relate to the burial of the deceased whose remains were brought into this Commonwealth and consist of the undertaker's services and the cost of digging the grave. They were incurred before but not paid till after the settlement of the account in Connecticut, and were not included in it. No doubt, if there had been but one administrator, and he in Connecticut, these items would have been allowed in his account if duly presented to and paid by him. *Jennison v. Hapgood*, 10 Pick. 77, 86, 87. But though the administration here was ancillary to that in Connecticut, we think that these expenses must be regarded as incurred by the ancillary administrator in the due course of his administration of the estate in this Commonwealth, and that as such they should be paid out of the property available here for the payment of demands due to creditors residing in that State.

A majority of the court think that the decree of the Probate Court should be reversed in respect to the items appealed from, and affirmed in other particulars, and it is

So ordered.

SECTION II.

WARDSHIPS.

IN RE KNIGHT.

COURT OF APPEAL. 1898.

[Reported [1898] 1 *Chancery*, 257.]

IN August, 1894, Agnes Maria Knight, widow, a resident in the Island of Jersey, was found by an order of the Royal Court of Jersey a person of unsound mind, and a gentleman resident in Jersey was, under the laws of the island, appointed curator of her property and person. The personal estate of the lunatic comprised a sum of Consols and also shares in an English bank and an English limited company all standing in her name. The curator accordingly presented a petition in Lunacy under section 134 of the Lunacy Act, 1890, asking for an order for transfer of the stock and shares into his name. Upon the petition coming before the judge in Lunacy, it was supported by an affidavit by the curator showing that the property required to be transferred was to be used for the maintenance or sole benefit of the lunatic; but the judge made a note that the affidavit "did not show that the money was needed for maintenance or for any other purpose of the lunatic." The curator, however, contended that, having been appointed in Jersey and having undertaken to get in the property of the lunatic, he was entitled as of right to have the stock and shares transferred to him, and that the court had no jurisdiction to deal with the lunatic's property beyond ordering a transfer of it to him, the curator, who was responsible to the Jersey court for the due application thereof. The curator then filed a further affidavit stating that according to the law of Jersey the whole personal estate of a person to whom a curator had been appointed by the royal court of Jersey vested absolutely in such curator, who was able to deal with the same absolutely as directed by his electors, being persons who in the present case had, under the direction of the Jersey court, made an inquiry into the mental condition of the lady. Upon the petition coming before him again on that affidavit the judge ordered the petition to be adjourned into court for argument on the question of jurisdiction.¹

LINDLEY, M. R. We all take the same view of this case. It was urged before the judge in Lunacy, sitting in chambers, that he had no jurisdiction in the matter, and the case was adjourned into court to have that point decided. I am clearly of opinion that Mr. Wood has put his case too high, and that it is not our duty to make an order parting with the possession of the lunatic's property without exercising some discretion in the matter. The section of the Lunacy Act, 1890,

¹ Arguments of counsel are omitted. — Ed.

dealing with this property, that is, with stock that cannot be transferred without an order, is section 134, which runs thus: [His Lordship read the section, and continued:—]

Now, Mr. Wood has brought himself within this section so far as it gives him the right to make this application. In *In re Brown* this court put an extensive rather than a restrictive interpretation on the words “vested in a person appointed for the management” of the property of the lunatic; and having regard to that decision, we are quite right in saying that the personal property of this lady has become “vested” in the applicant according to the law of Jersey within section 134 and the decision in *In re Brown*, [1895] 2 Ch. 666.

Then comes the question, What ought we to do? We should be running counter to what has been the established practice for the last one hundred years or more, if we were to hold that the court has no discretion in such a case as this. Mr. Wood has referred us to *Julius v. Bishop of Oxford*, 5 App. Cas. 214; but that case does not appear to carry him through at all. If we have property of a lunatic here, it is, to my mind, clear almost to demonstration that we have a discretion under section 134 as to granting or refusing such an application as this. Section 90 says, in sub-section 1, that “The judge in Lunacy may upon application by order direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs.” Then sub-section 2 says: “Where the alleged lunatic is within the jurisdiction, he shall have notice of the application and shall be entitled to demand an inquiry before a jury.” Then section 96 says: “Where the alleged lunatic is not within the jurisdiction it shall not be necessary to give him notice of the application for inquisition, and the inquisition shall be before a jury.” The section, it will be observed, says “shall.” Now just consider the effect of those sections. The law is not new: it is as old as the time of Lord Hardwicke, that in the case of a person resident abroad and having property in this country, the court has jurisdiction to direct an inquisition as to such person and to appoint a committee of that property. So that, if anybody were to apply here for an inquisition as to the sanity of this lady, the court would have jurisdiction to appoint a committee of the property of this lady within the jurisdiction, and to administer her estate. How, then, can it be incumbent upon this court, without exercising any discretion at all, to hand over this property to a foreign curator? If Mr. Wood’s contention is right, the court would lose the jurisdiction which it clearly has over a foreign lunatic’s property in this country. The real truth is that the jurisdiction of the court over lunatics who have property within the jurisdiction cannot be ousted by such ambiguous words as we find in section 134. The point was to some extent considered in *In re Brown*, *supra*, where it was said that the court must be cautious not to hand over the property unless a proper case was made out. There the court was satisfied that the property

was, in fact, required for the maintenance and support of the lunatic, who was resident in Victoria, and, therefore, made an order under section 134 for a transfer of funds in this country belonging to the lunatic to the Master in Lunacy in Victoria.

For the reasons I have given, and having regard to the terms of section 134 and comparing the terms of section 134 with sections 90 and 96, and also having regard to the long-established practice as to the jurisdiction of this court, I am clearly of opinion that Mr. Wood has put his case too high, and that the court has jurisdiction to exercise its discretion as to making an order such as is now asked for. This case was adjourned into court to have the question of jurisdiction decided. The application must stand over in order that the applicant may be at liberty to file further evidence showing that the fund is required for the maintenance of the lunatic according to the law of Jersey, and the grounds upon which the transfer of the stock should be made.

RIGBY, L. J. I am of the same opinion. We should not only be overruling, if not extinguishing, long-established authorities, but deciding something quite novel, if we were to hold that under section 134 the court has no discretion. No doubt, *prima facie* the proceedings in Lunacy abroad should be treated with all respect here, and in this case it may very well be that, acting upon our discretion, we may ultimately make the order asked for under section 134; that, however, must depend upon the nature of the further evidence that may be filed by the applicant. But, in my opinion, the point, which is the only one now before us, namely, whether we have a discretion, must be decided against the applicant.

VAUGHAN WILLIAMS, L. J. I am of the same opinion.

LINDLEY, M. R. We give the applicant leave to bring in a further affidavit. It is his duty to get in as much of the lunatic's property as he can.

DIDISHEIM v. LONDON AND WESTMINSTER BANK.

COURT OF APPEAL. 1900.

[Reported [1900] 2 Chancery, 15.]

LINDLEY, M. R.¹ This action is by M. Didisheim and by Madame Goldschmidt; by him as her next friend. The object is to obtain a large sum of cash and also share and stock certificates and scrip for bearer bonds and shares of great value from the defendants. The defendants are quite ready to pay and deliver these up provided they

¹ Part of the opinion only is given. — Ed.

can safely do so. The bulk of the property sought to be recovered formed part of the assets of M. Goldschmidt, a deceased gentleman, domiciled and resident in Belgium. He died some time ago, and his widow, the plaintiff, Madame Goldschmidt, obtained letters of administration with his will annexed. By her directions most of the property in the hands of the defendants has been placed in their books in her name. She is domiciled in Belgium and is resident abroad. She has become insane and is in a foreign lunatic asylum. M. Didisheim has been duly appointed her "administrateur provisoire," with power to collect and get in all her personal estate. He is also now the legal personal representative of M. Goldschmidt, having obtained letters of administration to his personal assets left unadministered by Madame Goldschmidt. He and she together, therefore, are clearly entitled to all the property sought to be obtained from the defendants. They do not deny M. Didisheim's right as administrator to such assets of the deceased as have not become Madame Goldschmidt's property; but they say that, owing to what she did when sane, all his assets in their hands became hers, and they are now accountable to her alone for them. As to the cash, certificates and scrip which are the property of Madame Goldschmidt, the defendants say they cannot safely hand them over to M. Didisheim, as the ownership of them is still vested in her and has not been legally vested in M. Didisheim. NORTH, J. has held that, unless an order is made in lunacy requiring or authorizing the defendants to deliver the property of Madame Goldschmidt to M. Didisheim, they cannot safely deliver such property to him.

The relations and friends of Madame Goldschmidt are particularly desirous of avoiding any formal adjudication of lunacy, and this appeal has been brought on purpose to avoid the necessity of such an adjudication. The title of the plaintiffs, it will be observed, is a purely legal title; there is no trust in the case. Under the old practice one action could not have been maintained to enforce a claim by M. Didisheim as administrator and also a claim by Madame Goldschmidt to recover her own property. Two separate actions of detinue or trover would have been necessary. Our modern practice, however, is less rigid, and the defendants have raised no objection to the two claims being joined in one action. The court, therefore, can properly entertain the action and decide the real question raised by the defendants, which is whether, in an action brought by M. Didisheim in his own name and in the name of Madame Goldschmidt and as her next friend the High Court ought to make an order for the delivery to him of her property. The question may be put in another way, whether he is entitled in an action so framed to demand delivery of her property to him. We are of opinion that he is.

In *Scott v. Bentley*, 1 K. & J. 281, a person resident in Scotland was entitled to an annuity charged on land in England and secured by a covenant entered into with himself. The annuitant became lunatic,

and a *curator bonis* was appointed according to Scottish law. Whether he was judicially declared a lunatic does not distinctly appear; nor does it appear that the ownership of his personal property was by Scottish law divested from him and vested in his curator. We rather infer that the curator merely had power to collect it and get it in. The annuity being in arrear, the curator brought a suit in Chancery in his own name against the executrix and devisee in trust of the grantor of the annuity for payment of the arrears and for payment of the annuity in future. It is to be observed that the demand of the plaintiff was a purely legal demand. He sought to enforce the legal right of the annuitant under the covenant and grant. But the arrears seem to have been set apart as a trust fund, and this was held enough to give the Court of Chancery jurisdiction to entertain the suit. Wood, V.-C., made an order as prayed by the bill. This decision has been much questioned; but unless it be that the suit ought in strictness to have been in the name of the lunatic by his curator as next friend, we see no ground for doubting the correctness of the decision.

Scott v. Bentley, *supra*, has been questioned mainly because it proceeded to some extent on the supposed authority of a decision in the House of Lords on an appeal from Scotland, in *In re Morrison's Lunacy*, Mor. Dict. 4595, 1 Cr. St. & P. 454. This case appears to have been to some extent misunderstood. The Vice-Chancellor refers to it as an unreported case cited in *Johnstone v. Beattie*, (1843) 10 Cl. & F. 42, and in *Sill v. Worswick*, (1791) 1 H. Bl. 677-8, 2 R. R. 816. In *Johnstone v. Beattie*, 10 Cl. & F. 97, Lord Brougham refers to *Morrison's Case*, *supra*, as cited in the note to *Sill v. Worswick*, *supra*, and as an authority for the proposition that the legally appointed curator in one country was held entitled to act in another. This, it is plain, was also Wood, V.-C.'s, view of *Morrison's Case*, as is apparent from his remark (1 K. & J. 285) that in *Morrison's Case* the curator sued alone. But the reports of that case to which we have referred, *supra*, show that the decision of the House of Lords in *Morrison's Case* did not go that length, and Lord Campbell was not satisfied that it did (10 Cl. & F. 133). We understand the decision as showing that a committee appointed in England of a Scotsman resident in England could not sue in Scotland simply in his own name and as committee for the recovery of the lunatic's personal estate; but that such committee could sue there in the name of the lunatic for the recovery of the lunatic's personal estate. *Morrison's Case*, therefore, did not go so far as Wood, V.-C., thought, but it goes a long way to show that the proceedings in this action are properly framed; for this action is brought, not only by M. Didisheim in his double capacity of administrator of Madame Goldschmidt and curator of Madame Goldschmidt, but also by her in her own name suing by M. Didisheim as her next friend. In *Scott v. Bentley*, *supra*, Wood, V.-C., did not by any means base his judgment only on the supposed decision in *In re Morrison's Lunacy*, *supra*, and after making every

allowance for his misapprehension in that case, *Scott v. Bentley* was, in our opinion, well decided, although we cannot help thinking that, if Wood, V.-C., had known the form of the order made in Morrison's Case, he would have directed the bill to be amended by making it in form a bill by the lunatic by his curator and next friend.

In *Alivon v. Furnival*, 1 C. M. & R. 277, 286, 40 R. R. 561, Parke, B. expressed a clear opinion to the effect that a foreign curator could sue here in his own name for goods and chattels of a person of unsound mind.

Scott v. Bentley, *supra*, is consistent with and is really supported by several other cases cited by Mr. Haldane, and of which *Re Tarratt*, 51 L. T. 310, *In re De Linden*, [1897] 1 Ch. 453, and *Thiery v. Chalmers, Guthrie & Co.*, [1900] 1 Ch. 80, are the most recent and important. In *In re De Linden*, an application was made on behalf of a Bavarian lunatic lady for payment out to two foreign gentlemen of some money in court belonging to her. The application was by her in her own name by her next friend, who was a Bavarian judge and one of two persons appointed by a Bavarian court to take charge of her and her property. The order was made as asked — that is, for payment, not to her, but to the two persons appointed as above mentioned. The lady had been judicially declared lunatic, but there was no judicial vesting of her property in the curators.

Thiery v. Chalmers, Guthrie & Co., *supra*, was a similar case. The lunatic there was a French subject declared lunatic in France, and whose property was placed under the care of a duly appointed *tuteur*. An action was brought in this country by the lunatic by a next friend and by the *tuteur* as a co-plaintiff to recover money and securities in the hands of the lunatic's bankers. An order was made for the delivery of them to the *tuteur*. Kekewich, J., thought that the *tuteur* might have sued alone in his own name. He regarded the decision in *In re Brown*, [1895] 2 Ch. 666, as an authority for so holding, inasmuch as both in *In re Brown* and in *Thiery v. Chalmers, Guthrie & Co.* the lunatic had been formally so declared by the foreign court. But *In re Brown* was not an action; it was an application to the Court in Lunacy under section 134 of the Lunacy Act, and we doubt whether the action in *Thiery v. Chalmers, Guthrie & Co.* would have been rightly framed if brought by the *tuteur* as sole plaintiff.

An alteration in the status of a lunatic appears to be necessary in order to enable the Court in Lunacy to exercise the jurisdiction conferred upon it by section 134 of the Lunacy Act, 1890; but it by no means follows that persons, whose status has not been altered by their being judicially declared lunatic cannot sue by themselves by a next friend for the recovery of their own property. *In re Knight*, [1898] 1 Ch. 257, turned on the discretion which the court had under section 134 of the Lunacy Act, and throws no real light on this case.

The only difficulty in the way of the plaintiffs is occasioned by *In re Barlow's Will*, 36 Ch. D. 287. In that case a colonial statute vested

in a Master in Lunacy the care and custody of the property of lunatic patients — that is, of persons confined in lunatic asylums but not judicially declared lunatic. A colonial lady, confined in a lunatic asylum in the colony, was entitled to some funds in the hands of trustees in this country, and the colonial Master in Lunacy claimed these funds. The trustees paid them into court under the Trustee Relief Act. The colonial Master and the lady by her next friend presented a petition for the transfer of the funds in court to the colonial Master in Lunacy. The court made an order for the payment out of capital of some past maintenance and for the payment of the income to the master whilst the lady continued in an asylum. But the court would not order the rest of the corpus to be paid over to the master. It is to be observed that the general statutory authority given by the Colonial Act to the master as an officer of the colonial court was not supplemented by any order giving the master any express authority, as the lunatic's attorney, to get in any property not locally within the jurisdiction of the court; and, as we understand Cotton, L. J.'s judgment, he was much influenced by the omission of any such order. If the master's authority derived from the colonial statute was unsatisfactory, it is obvious that such authority was not improved by his assumption of the right to use the lunatic's name. In that view of the case, the fact that the lunatic petitioned in her own name by her next friend did not remove the difficulty. Having decided that the master was not entitled as a matter of right to demand payment to himself, it became necessary for the court, acting as trustees, to consider what it was the duty of trustees to do in such a case as that before them; and they considered that in such a case the trustees ought not to part with the trust fund without seeing to its application, and ought not to part with the fund to the master further than they were satisfied that the interests of the lunatic rendered it necessary to do so. This was the view taken in *In re Garnier*, L. R. 13 Eq. 532, where, however, the lunatic was a domiciled Englishman, and we see no reason to dissent from it where the authority of the foreign curator to get in the trust property is regarded by the court as unsatisfactory. But where it is not, the considerations which weighed with the court in *In re Barlow's Will*, *supra*, do not arise. A person absolutely entitled to trust money is entitled to have it paid to him or to any one duly appointed by him to receive it, and the trustees or the court acting for them have no discretion to refuse payment. The same principle is, in our opinion, applicable to the case in which trust money belongs to a lunatic and a person is duly appointed by a competent authority to get in such money for the lunatic. If the title of the lunatic is clear, and the authority to act for him is equally clear, we fail to see what discretion the court, acting for the trustees, has in the matter. The trustees may properly say that they cannot safely act without the sanction of the court, but we fail to see what other discretion there is. Where the lunacy jurisdiction is being exercised, as it was in *In re Stark*, 2 Mac. & G. 174,

other considerations at once arise. If, as in *In re Garnier*, *supra*, the lunatic were an Englishman temporarily abroad, and confined as a lunatic abroad, we should feel considerable difficulty in holding that the courts of this country were bound to recognize the title of a foreign curator to sue in this country. But here we are dealing with an alien domiciled abroad, and over whom the courts of this country have no jurisdiction except such as is conferred by the fact that she has property here. All that the court here has to do is to see that the person claiming it is entitled to have it.

In this case the order of the Belgian court of November 25, 1899, removes all doubt as to M. Didisheim's authority to take these proceedings and to obtain and give a good discharge for the property which he seeks to recover. On general principles of private international law, the courts of this country are bound to recognize the authority conferred on him by the Belgian courts, unless lunacy proceedings in this country prevent them from doing so. What ought to be done in lunacy has not to be considered, and we say nothing on this subject. In our opinion, the appeal should be allowed, and an order be made as asked by the claim. But the plaintiffs must pay all the costs; for the bank was perfectly justified in not complying with M. Didisheim's demands without an order of the High Court — that is, without proving his title in such a way as to make it unreasonable for the bank to refuse to recognize it. Under the old practice an action of detinue or trover might have failed; for under the general issue the defendants could have given in evidence facts excusing delivery to a person rightfully entitled, but whose title was not such as the defendants could safely recognize. See per Blackburn, J., in *Hollins v. Fowler*, (1875) L. R. 7 H. L. 766, and the cases there cited. But in practice, if in such a case the plaintiff proved his title to the satisfaction of the court and paid the defendant's costs, the plaintiff always obtained delivery. Under the modern practice, if this case had been tried by a jury there would be no difficulty, we apprehend, in ordering delivery to M. Didisheim, and, in a proper case like this, giving the defendants the costs of the action — that is, there would be good cause for making the plaintiffs pay the costs, although they succeeded in establishing their title. See *Gleddon v. Trebble*, 9 C. B. (N. S.) 367. If the action were tried without a jury, whether in the Chancery Division, as this was, or in the Queen's Bench Division, the costs would be in the discretion of the judge, and there would be no difficulty in ordering delivery to the plaintiffs and ordering them to pay the costs. However tried, any other result would be very unjust.

Mr. Terrell suggested that the order of the court would not protect the bank if the lunatic were to recover and were to sue the bank for her money and property after the bank had paid and delivered it to M. Didisheim. We do not entertain any misgiving on this point. The High Court clearly had jurisdiction to entertain the action and to decide the questions raised in it, and to make the order which this

court now declares it ought to have made; and this court clearly has jurisdiction to entertain this appeal. This being clear, and the Belgian court having had jurisdiction to make the order which it made, the bank would unquestionably have a perfectly good defence to any action which the lunatic could bring against it, either by another next friend or by another official curator, or by herself if she should recover.¹

SECTION III.

INSOLVENT ESTATES.

MAY v. WANNEMACHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1872

[*Reported 111 Massachusetts, 202.*]

TRUSTEE process against Charles Wannemacher and Joseph Maxfield, surviving partners of the firm of N. Sturtevant & Company, on promissory notes indorsed by the firm. John Borrowscale was summoned as trustee of the defendants. Writ dated June 6, 1865.

The case, as it appeared from the answer of the trustee and an agreed statement of facts, upon which it was submitted to the judgment of the Superior Court, was as follows:—

The firm of N. Sturtevant & Company was composed of the defendants, both of whom were domiciled in Philadelphia in the Commonwealth of Pennsylvania, and were citizens of Pennsylvania, and of Noah Sturtevant, who was domiciled in Boston and was a citizen of Massachusetts. The firm did business both in Philadelphia and Boston.

The following indenture was executed on the day of its date. [The substance of the indenture was a conveyance by N. Sturtevant & Company, and by each member of the firm, of all their property to Joseph A. Clay of Philadelphia, for the benefit of their creditors.]

It was agreed by the parties “that general assignments by debtors for the benefit of their creditors were recognized by the law of Pennsylvania at the time the assignment in this case was made, by an act of the Assembly of Pennsylvania of June 14, 1836; that by subsequent acts all preferences in such assignments, except for wages of labor to a limited amount, are avoided, and the assignments enure to the benefit of all the creditors equally, with the above exception, so far as the laws of Pennsylvania have force; that the assignment of October 25, 1861, to Clay, was general and without preferences, so far as the laws

¹ Followed in case of a lunatic residing abroad, though domiciled in England. *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666. — Ed.

of Pennsylvania have force, and conformable to the laws of Pennsylvania; that Clay, the assignee, filed his first account November 17, 1863; that it was referred to John N. Campbell, a master, for audit and distribution; that claims of creditors were proved prior to April 14, 1864, to the amount of \$412,027.18; that Campbell filed his report on that day, and declared a dividend of $3\frac{1}{10}$ per cent, which has been paid as demanded; that on December 30, 1864, Campbell filed a supplementary report, admitting a claim of \$2,645.37, to a dividend, and some small claims were proved afterwards; that Clay subsequently filed his second account, exhibiting a balance of \$11,613.77, which, with some little accrued interest, will suffice for a further dividend of between two and three per cent; that there is an apparently hopeless claim against a bankrupt estate still outstanding, but nothing else recoverable by the assignee, unless the claim in the present case can be enforced; that by the laws of Pennsylvania creditors only recognize the assignment by proving their claims and accepting dividends, as they have done in this case to the extent above mentioned, and they have no remedy against the assigned property except this; and that no judgment or execution binds or can be levied on the estate after the assignment, and the assignment is valid against them in every way, so far as the laws of Pennsylvania have force."

Borrowscale, who was a citizen of Massachusetts, was employed by Clay, assignee, under the laws of Pennsylvania, of the firm of N. Sturtevant & Company, to collect certain amounts due that firm; and he did collect certain sums, of which he paid over part to Clay, and held the balance in his hands at the time when he was summoned as trustee.

The plaintiff was a citizen of Massachusetts, domiciled there at the time of the assignments to Clay and of the bringing of this suit, and also at the time of the making of the notes sued on, which were made and delivered in Massachusetts; and the plaintiff never proved his claim under the assignments to Clay, or in any manner recognized or assented to the said assignments, or to the action of Clay under the same, or to the doings of the other creditors in regard to said assignments. Noah Sturtevant died before this action was brought.

The Superior Court discharged the trustee, and the plaintiff appealed.

WELLS, J. The St. of 1836, c. 238, having been repealed, this case is not affected by any considerations arising from that statute, or from the general policy of the insolvent laws of Massachusetts. *National Mechanics' & Traders' Bank v. Eagle Sugar Refinery*, 109 Mass. 38.

Independently of those laws, it has always been held that voluntary assignments by a debtor, in trust for the payment of debts, and without other adequate consideration, are invalid as against attachment, except so far as assented to by the creditors for whose benefit they were made. If assented to by creditors, such assignments are good at common law, and will protect the property or fund from attachment to the extent of the amount due to creditors thus assenting; unless, by

the conditions of the assignment, it is made to take effect only upon the assent of all, or a prescribed number of creditors.

The assent of creditors will not be presumed on the ground that it is apparently for their interest; but must be shown by some form of adoption or affirmative acquiescence. *Russell v. Woodward*, 10 Pick. 408, 413.

In cases of assignment by a tripartite instrument, it is generally necessary that creditors should execute the instrument in order to give it full effect, because such is the intent with which it is made. But when this is not required by the form of the instrument of assignment, it is only necessary that creditors should give such assent to its provisions as will recognize and affirm the acceptance and possession of the property by the assignee, as made and held for their benefit and in their behalf, in accordance with the terms of the assignment. *Russell v. Woodward*, 10 Pick. 408; *Everett v. Walcott*, 15 Pick. 94.

If creditors present their claims to the trustees for allowance for the purpose of a distribution, in accordance with the terms of the assignment, they thereby assent to the trust; and the trustee thereafter holding the property in their behalf holds it upon a legal consideration, and his title is perfected. The effect is the same if they present their claims to commissioners or other persons appointed for that purpose, in accordance with the terms of the assignment. And it can make no difference, in this particular, if those persons are appointed under provisions of local public law, with reference to which the instrument of assignment was made.

The foregoing propositions meet and cover the present case. The assignment was made with reference to the laws of Pennsylvania. It is agreed that, by those laws, such an assignment is recognized as valid; and the proof and allowance of claims, and the distribution, are conducted as judicial proceedings. Creditors, to an amount largely exceeding the total assets, have presented and proved their claims and accepted dividends upon them, thereby signifying their adoption of the assignment for their benefit.

The question is made how far the courts of this Commonwealth are bound to recognize assignments of this kind, made in a foreign jurisdiction, when set up against our own citizens claiming to hold, by attachment, property of the insolvent debtor found within this jurisdiction.

Such assignments made by commissioners of bankruptcy, or by judicial or legislative authority merely, without the act and assent of the debtor, are not held as binding upon the courts of another State. *Taylor v. Columbian Ins. Co.*, 14 Allen, 353.

An assignment made by the debtor himself in another State, which, if made here, would be set aside for want of consideration or delivery, or as fraudulent, or contravening the policy of the law of this Commonwealth, will not be sustained here against an attachment, although valid in the State or country where made. *Zipcey v. Thompson*,

1 Gray, 243; Fall River Iron Works Co. v. Croade, 15 Pick. 11; Ingraham v. Geyer, 13 Mass. 146; Osborn v. Adams, 18 Pick. 245.

In each case above mentioned, to sustain the assignment would be to give force and effect here to the foreign law, which has none *suo vigore*. That is a matter of comity, and not of right. But in each case the assignment is always sustained so far as it affects property which was at the time within the jurisdiction where it was made: Benedict v. Parmenter, 13 Gray, 88; Wales v. Alden, 22 Pick. 245; and also as against all citizens of that jurisdiction, even when seeking a remedy here against property found here. Rhode Island Central Bank v. Danforth, 14 Gray, 123; Martin v. Potter, 11 Gray, 37; Richardson v. Forepaugh, 7 Gray, 546; Whipple v. Thayer, 16 Pick. 25; Daniels v. Willard, Ib. 36.

This assignment is made by the debtors themselves. No fraud is shown or suggested. It in no respect contravenes the policy of law as established in this Commonwealth. It is assented to by creditors sufficiently to give it a valid consideration and full legal effect, if it had been made here. The effect of that assent does not depend at all upon the judicial proceedings in Pennsylvania. Giving no force whatever to the judicial authority of those proceedings, or to the local law, we find in the acts of the parties sufficient to constitute a legal and valid assignment, which should be held to be good wherever made, and effectual to pass the rights of the debtors even to property not subject to the local laws of Pennsylvania. Means v. Hapgood, 19 Pick. 105; Newman v. Bagley, 16 Pick. 570. The judgment therefore must be

Trustee discharged.

IN THE MATTER OF THE ACCOUNTING OF WAITE.

COURT OF APPEALS, NEW YORK. 1885.

[*Reported 99 New York, 433.*]

EARL, J. On the 15th day of October, 1881, Haynes & Sanger, a firm doing business in the city of New York, having become insolvent, made a general assignment, for the benefit of their creditors, to Charles Waite, who was a member of the firm of Pendle & Waite, and in their assignment preferred that firm as creditors for a large amount. Pendle & Waite did business in New York and London, Waite being a citizen of this country residing in the city of New York and having charge of the business of his firm there, and Pendle being a citizen of England and having charge of the firm business there. That firm became insolvent and suspended business in England in February, 1882, and Waite then went to England, and there he and Pendle filed a petition in the London Court of Bankruptcy, in which they recited their inability to pay their debts in full, and that they were "desirous of instituting proceedings for the liquidation of their affairs by arrangement or composition with their creditors, and hereby submit to the jurisdiction of this court in the matter of such proceeding." Waite signed the petition in person, and through his counsel at once secured the appointment of Schofield as receiver, in bankruptcy, of the firm property.

Liquidation by arrangement or composition is a proceeding under the English bankruptcy act which provides that the filing of such a petition is an act of bankruptcy; that a compromise proposition may be made by a debtor, and that if such proposition shall be accepted by the creditors at a general meeting, and then confirmed at a second general meeting, and registered by the court, it becomes binding and may be carried out under the supervision of the court; that if it appears to the court on satisfactory evidence that a composition cannot in consequence of legal difficulties, or for any other sufficient cause, proceed without injustice or undue delay to the creditors, or the debtor, the court may adjudge the debtor a bankrupt and proceedings may be had accordingly, and that the title of the trustee in bankruptcy, when appointed, relates back to the time of the commission of the act of bankruptcy.

For reasons which it is unnecessary now to consider or relate, the composition failed, and then upon the application of creditors, which was opposed by Waite, Pendle & Waite were adjudged bankrupts, and Schofield was appointed trustee of the firm property. By the English law, the due appointment of a trustee in bankruptcy, under the English bankruptcy act, transfers to the trustee all the personal property of the bankrupt wherever situated, whether in Great Britain or elsewhere.

Notwithstanding his bankruptcy, Waite continued to act as assignee

of Haynes & Sanger and converted the assets of that firm into money, and under the preference given to his firm paid himself for the firm of Pendle & Waite the sum of \$14,333.70. He paid no portion of that sum to Pendle or to the creditors of his firm, the American creditors of such firm having been fully paid from other assets of the firm.

After all this, Waite filed his petition in the Court of Common Pleas of the city of New York for a settlement of his accounts as assignee, and citations were issued, served, and published for that purpose, and a referee was appointed to take and state his accounts. In his accounts he entered and claimed a credit for the sum paid to himself as above stated. Schofield, through his attorney, appeared upon the accounting and as trustee objected to the credit and claimed that sum should be paid to him. The referee ruled that the law of this State does not recognize the validity of foreign bankruptcy proceedings to transfer title to property of the bankrupt situated here, and for that reason held that the payment by Waite, as assignee, to himself as a member of the firm of Pendle & Waite, was valid, and that he was entitled to the credit claimed. The same view of the law was taken at the special and general terms of the common pleas, and then Schofield appealed to this court.

We have stated the facts as found by the referee, and as the respondent did not and could not except to the findings, and is therefore in no condition to complain of them, we must assume that they were based upon sufficient evidence.

The transfer of the property of Pendle & Waite to Schofield as trustee was *in invitum*, solely by operation of the English bankrupt law. While the proceeding first instituted by the bankrupts to arrange a composition with their creditors was voluntary, the final proceeding through which the adjudication in bankruptcy was had, and the trustee appointed was adversary and against their will, having no basis of voluntary consent to rest on. *Willits v. Waite*, 25 N. Y. 577.

If the transfer effected by the bankruptcy proceedings is to have the same effect here as in England, then the title to the money due to the bankrupts from Haynes & Sanger was vested in the trustee. Schofield was appointed receiver of the property of the bankrupts in March, 1882, and then the title passed out of them. That title continued in him as receiver until he was appointed trustee. After he was appointed receiver and before or after he was appointed trustee (which does not appear), Waite as assignee paid himself as a member of the firm of Pendle & Waite the sum of money in controversy. He had notice of the bankruptcy proceedings and knew that the title to the money due from Haynes & Sanger and from himself as their assignee had passed out of the bankrupts to Schofield, and hence he had no right to make payment to them. Schofield became substituted in their place, and Waite was bound to make payment to him, and cannot, therefore, have credit for a payment wrongfully made. And Schofield, standing in

the place of the original creditors of Haynes & Sanger, had the right to appear upon the accounting and object to the erroneous payment made in disregard of his rights. But the alleged payment was merely formal, not real. Waite, the assignee, still has the money and is accountable for it to the proper party. It is not perceived how it can be claimed that Schofield was bound at any time before the accounting to make any demand upon the assignee. He was a creditor holding the claim originally due to Pendle & Waite, and as such he could appear upon the accounting, with all the rights of any other creditor, to protect his interests, and he could not be prejudiced by a payment alleged to have been made by the assignee to himself. All this is upon the assumption that the transfer to Schofield as trustee is to have the same force and effect here as against the bankrupts as in England; and whether it must have, is the important and interesting question to be determined upon this appeal.

It matters not that Waite was a citizen of this country, domiciled here. He went to England and invoked and submitted to the jurisdiction of the bankruptcy court there and is bound by its adjudication to the same extent as if he had been domiciled there. The adjudication estopped him just as every party is estopped by the adjudication of a court which has jurisdiction of his person and of the subject-matter.

We have not a case here where there is a conflict between the foreign trustee and domestic creditors. So far as appears no injustice whatever will be done to any of our own citizens, or to any one else, by allowing the transfer to have full effect here. Indeed justice seems to require that this money should be paid to the foreign trustee for distribution among the foreign creditors of the bankrupts.

The effect to be given in any country to statutory *in invitum* transfers of property through bankruptcy proceedings in a foreign country has been a subject of much discussion among publicists and judges, and unanimity of opinion has not and probably never will be reached. We shall not enter much into the discussion of the subject and thus travel over ground so much marked by the footsteps of learned jurists. Our main endeavor will be to ascertain what, by the decisions of the courts of this State, has become the law here.¹

In *Willitts v. Waite* (25 N. Y. 577), it was held that statutory receivers appointed in Ohio could not enforce their title to the property of the insolvent in this State against creditors subsequently attaching it here, under our laws. In that case, while Sutherland, J., was of opinion that from comity the courts of this State should recognize and allow some effect to a foreign involuntary bankrupt proceeding, yet he erroneously said that he understood that a title under such proceedings

¹ The learned judge here examined the following cases: *Bird v. Caritat*, 2 Johns. 342; *Raymond v. Johnson*, 11 Johns. 488; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Holmes v. Remsen*, 20 Johns. 229; *Plestorio v. Abraham*, 1 Paige, 236, 3 Wend. 538; *Johnson v. Hunt*, 23 Wend. 87; *Hoyt v. Thompson*, 5 N. Y. 320, 19 N. Y. 207. — Ed.

"would not be recognized by the courts of this State, even when the question arises entirely between the bankrupt and his assignees and creditors all residing in the country under whose laws the assignment was made." Allen, J., writing in the same case, said: "A *quasi* effect may be given to the law (of a foreign State) as a matter of comity and interstate or international courtesy, when the rights of creditors or *bona fide* purchasers, or the interests of the State do not interfere, by allowing the foreign statutory or legal transferee to sue for it in the courts of the State in which the property is;" and that "the State will do justice to its own citizens so far as it can be done by administering upon property within its jurisdiction, and will yield to comity in giving effect to foreign statutory assignments only so far as may be done without impairing the remedies or lessening the securities which our laws have provided for our own citizens." The rule, as stated by Judges Platt, Ruggles, Allen, and other eminent jurists, whose opinions we have quoted, were also fully recognized in the following cases: *Peterson v. Chemical Bk.*, 32 N. Y. 21; *Kelly v. Crapo*, 45 N. Y. 86; *Osgood v. Maguire*, 61 N. Y. 524; *Hibernia Bk. v. La-combe*, 84 N. Y. 367; *Matter of Bristol*, 16 Abb. Pr. 184; *Runk v. St. John*, 29 Barb. 585; *Barclay v. Quicksilver Mining Co.*, 6 Lans. 25; *Hooper v. Tuckerman*, 3 Sandf. 311; *Olyphant v. Atwood*, 4 Bosw. 459; *Hunt v. Jackson*, 5 Blatchf. 349.

From all these cases the following rules are to be deemed thoroughly recognized and established in this State: (1) The statutes of foreign States can in no case have any force or effect in this State *ex proprio vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. (2) But the comity of nations which Judge Denio in *Peterson v. Chemical Bank* (*supra*) said is a part of the common law, allows a certain effect here to titles derived under, and powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here, when they can be, without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided also that such titles are not in conflict with the laws or the public policy of our State. (3) Such foreign assignees can appear and, subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with, or withhold the property of the bankrupt.

If it be admitted, as it must be under the authorities cited, that Schofield can, as assignee of Pendle & Waite, have a standing in our courts, and that his title will be so far recognized here that he can sue the debtors of that firm to recover the amount owing to the firm, why may he not sue the bankrupts? If the assignee could sue Haynes & Sanger to recover what they owed the bankrupts, why can he not be permitted to sue the bankrupts for money or property placed in their hands to pay the debt? If he could sue Haynes & Sanger, why could

not he sue their assignee, although a member of the bankrupt firm, to recover the money placed in his hands to pay their debt? No principle of justice, no public policy requires the courts of this State to ignore the title of this assignee at the instance of one of the bankrupts. No injustice will be done to Waite if this money be taken to pay his creditors, and public policy does not require that the courts of this State should protect him in his efforts either to cheat his creditors or his partner. If it be conceded, as it must be, that the title of a foreign statutory assignee is good in this State for any purpose against anybody, it seems to us that it ought to be held good against the bankrupt against whom an adjudication in bankruptcy has been pronounced which is binding upon him.

Before such an adjudication can be held to be efficacious in a foreign country to transfer title to property, the bankrupt court must have had jurisdiction of the bankrupt either because made in the country of his domicile or because he, although domiciled elsewhere, submitted to the jurisdiction or in some other way came under the jurisdiction of the bankrupt court. Here Pendle & Waite did most of their business in England. Most of their assets and of their creditors were there, and while Pendle alone was domiciled there, Waite went there and submitted to the jurisdiction of the bankrupt court and exposed himself to the operation of English law. He is therefore bound by the adjudication of the court as he would have been if domiciled there, and the judgment had been in a common law court upon any personal cause of action.

The decisions in the federal courts, and in most of the other States, are in harmony with the views we have expressed; and so are the doctrines of all the great jurists who have written upon the subject of private international law. 2 Bell's Comm. 681, 687; Wheaton's Int. L. [8th ed., by Dana], §§ 89, 90, 91, 144 and note; 2 Kent's Comm. 405; Wharton's Conf. of Laws, §§ 353, 368, 391, 735, 736; Story's Conf. of Laws, §§ 403, 410, 412, 414, 420, 421.

There are but two cases in this State which really hold anything in conflict with these views, and they are *Mosselman v. Caen* (34 Barb. 66; N. Y. Sup. Ct. [4 T. & C.] 171). In the first case the action was by foreign trustees, appointed in bankruptcy proceedings, to recover goods in the possession of the defendant in this country, and the plaintiffs recovered. The defendant appealed, and sought to reverse the judgment upon the ground that the plaintiffs did not, as trustees, have any title to the property. The judgment was affirmed, on the ground that the defendant did not raise the question of title at the trial. But the judges writing were of opinion that the plaintiffs did not have any title to the bankrupt's property located here, and one of them (Sutherland, J.) stated that the case of *Abraham v. Plestoro* (8 Wend. 538), confirmed by *Johnson v. Hunt*, "would seem to be conclusive upon the question, whether our courts will recognize or enforce a right or title acquired under a foreign bankrupt law or foreign bank-

ruptcy judicial proceedings. The case of *Abraham v. Plestoro* was certainly very broad in its repudiation of foreign bankruptcy proceedings, and went much further than the case of *Holmes v. Remsen* (20 Johns. 229); but I think it must be deemed conclusive authority for saying, that had the defendant raised the question by demurrer, or on the trial, it must have been held that the plaintiffs could not maintain this action." In the second case *Davis, P. J.*, writing the opinion of the court, said: "It seems to be the settled law of this State that our courts will not recognize or enforce a right or title acquired under a foreign bankrupt law, or foreign bankrupt proceedings, so far as affects property within their jurisdiction, or demands against residents of the State." These two cases are unsupported by authority, and are, we think, opposed to sound principles, and are in conflict with the current of authority in this State.

We are, therefore, of opinion that Schofield was competent to appear upon the accounting to protect the interests of the bankrupt estate which he represented, and that, upon the facts as they appear in this record, his objection to the allowance of the payment made by the assignee to himself ought to have prevailed, and that he should be recognized as a creditor for the amount of such payment.

It follows that the orders of the General and Special Terms should be reversed, and, as the facts may be varied or more fully presented upon a new hearing, the matter should be remitted to the Special Term for further proceedings upon the same or new evidence, in accordance with the rules of law herein laid down, and that the appellant should recover from the respondent costs of the appeals to the General Term and to this court.

All concur.

Ordered accordingly.

SECURITY TRUST COMPANY v. DODD, MEAD & CO.

SUPREME COURT OF THE UNITED STATES. 1899.

[Reported 173 *United States*, 624.]

THIS was an action originally instituted in the District Court for the Second Judicial District of Minnesota, by the Security Trust Company, as assignee of the D. D. Merrill Company, a corporation organized under the laws of Minnesota, against the firm of Dodd, Mead & Company, a partnership resident in New York, to recover the value of certain stereotyped and electrotyped plates for printing books, upon the ground that the defendants had unlawfully converted the same to their own use. The suit was duly removed from the State court to the Circuit Court of the United States for the District of Minnesota, and was there tried. Upon such trial the following facts appeared:—

The D. D. Merrill Company having become insolvent and unable to pay its debts in the usual course of business, on September 23, 1893, executed to the Security Trust Company, the plaintiff in error, an assignment under and pursuant to the provisions of chapter 148 of the laws of 1881 of the State of Minnesota, which assignment was properly filed in the office of the clerk of the District Court. The Trust Company accepted the same, qualified as assignee, took possession of such of the property as was found in Minnesota, and disposed of the same for the benefit of creditors, the firm of Dodd, Mead & Company having full knowledge of the execution and filing of such assignment.

At the date of this assignment, the D. D. Merrill Company was indebted to Dodd, Mead & Company of New York in the sum of \$1,249.98, and also to Alfred Mudge & Sons, a Boston co-partnership in the sum of \$126.80, which they duly assigned and transferred to Dodd, Mead & Company, making the total indebtedness to them \$1,376.78.

Prior to the assignment, the D. D. Merrill Company was the owner of the personal property for the value of which this suit was brought. This property was in the custody and possession of Alfred Mudge & Sons at Boston, Massachusetts, until the same was attached by the sheriff of Suffolk County, as hereinafter stated.

The firm of Alfred Mudge and Sons was, prior to March 8, 1894, informed of the assignment by the Merrill Company, and at about the date of such assignment a notice was served upon them by George E. Merrill to the effect that he Merrill, took possession of the property in their custody for and in behalf of the Security Trust Company, assignee aforesaid.

On March 8, 1894, Dodd, Mead & Company commenced an action against the D. D. Merrill Company in the superior court of the county of Suffolk, upon their indebtedness, caused a writ of attachment to be issued, and the property in possession of Mudge & Sons seized upon such writ. A summons was served by publication in the manner prescribed by the Massachusetts statutes, although there was no personal service upon the Merrill Company. The Security Trust Company, its assignee, was informed of the bringing and pendency of this suit and the seizure of the property, prior to the entering of a judgment in said action, which judgment was duly rendered August 6, 1894, execution issued, and on September 27, 1894, the attached property was sold at public auction to Dodd, Mead & Company, the execution creditors, for the sum of \$1,000.

Upon this state of facts, the Circuit Court of Appeals certified to this court the following questions:—

“First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualification as assignee thereunder, vest said assignee with the title to the personal property aforesaid, then located in the State of Massa-

chusetts, and in the custody and possession of said Alfred Mudge & Sons?

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk County, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim?"

BROWN, J. This case raises the question whether an assignee of an insolvent Minnesota corporation can maintain an action in the courts of Minnesota for the conversion of property formerly belonging to the insolvent corporation, which certain New York creditors had attached in Massachusetts, and sold upon execution against such corporation. The question was also raised upon the argument how far an assignment, executed in Minnesota, pursuant to the general assignment law of that State, by a corporation there resident, is available to pass personal property situated in Massachusetts as against parties resident in New York, who, subsequent to the assignment, had seized such property upon an attachment against the insolvent corporation.

The assignment was executed under a statute of Minnesota, the material provisions of which are hereinafter set forth. The instrument makes it the duty of the assignee "to pay and discharge, in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of the first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter 148 of the General Laws of the State of Minnesota for the year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such case made and provided; and if, after the payment of all the costs, charges, and expenses attending the execution of said trust, and the payment and discharge in full of all the said debts of the party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then, Third, repay such surplus to the party of the first part, its successors and assigns."

The operation of voluntary or common law assignments upon property situated in other States has been the subject of frequent discus-

sion in the courts, and there is a general consensus of opinion to the effect that such assignments will be respected, except so far as they come in conflict with the rights of local creditors, or with the laws or public policy of the State in which the assignment is sought to be enforced. The cases in this court are not numerous, but they are all consonant with the above general principle. *Black v. Zacharie*, 8 How. 483; *Livermore v. Jenckes*, 21 How. 126; *Green v. Van Buskirk*, 5 Wall. 307; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664; *Cole v. Cunningham*, 133 U. S. 107; *Barnett v. Kinney*, 147 U. S. 476.

But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a State insolvent law operates only upon property within the territory of that State, and that with respect to property in other States it is given only such effect as the laws of such State permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another State. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the State where the property is actually situated. *Harrison v. Sterry*, 5 Cranch, 289, 302; *Ogden v. Saunders*, 12 Wheat. 213; *Booth v. Clark*, 17 How. 322; *Blake v. Williams*, 6 Pick. 286; *Osborn v. Adams*, 18 Pick. 245; *Zipcey v. Thompson*, 1 Gray, 243; *Abraham v. Plestoro*, 3 Wend. 538, overruling *Holmes v. Remsen*, 4 Johns. Ch. 460; *Johnson v. Hunt*, 23 Wend. 87; *Hoyt v. Thompson*, 5 N. Y. 320; *Willits v. Waite*, 25 N. Y. 577; *Kelly v. Crapo*, 45 N. Y. 86; *Barth v. Backus*, 140 N. Y. 230; *Weider v. Maddox*, 66 Tex. 372; *Rhawn v. Pearce*, 110 Ill. 350; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477. As was said by Mr. Justice McLean in *Oakey v. Bennett*, 11 How. 33, 44, "A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment." Similar language is used by Mr. Justice Story in his *Conflict of Laws*, § 414.¹

The statute of Minnesota, under which this assignment was made, provides in its first section that any insolvent debtor "may make an

¹ *Acc. Le Chevalier v. Lynch*, 1 Doug. 170; *Reynolds v. Adden*, 136 U. S. 348; *Betton v. Valentine*, 1 Curt. 168; *Paine v. Lester*, 44 Conn. 196; *Rhawn v. Pearce*, 110 Ill. 350; *Johnson v. Parker*, 4 Bush. 149 (*semble*); *Metcalf v. Yeaton*, 51 Me. 198; *Wood v. Parsons*, 27 Mich. 159; *Beer v. Hooper*, 32 Miss. 246; *Hoyt v. Thompson*, 19 N. Y. 207; *Bizzell v. Bedient*, 2 Car. L. Rep. 254; *Milne v. Moreton*, 6 Binn. 353; *Goodsell v. Benson*, 13 R. I. 225 (*semble*); *McClure v. Campbell*, 71 Wis. 350, 37 N. W. 343. *Contra*, *Long v. Girdwood*, 150 Pa. 413, 24 Atl. 711. — Ed.

assignment of all his unexempt property for the equal benefit of all his *bona fide* creditors, who shall file releases of their demands against such debtor, as herein provided." That such assignments shall be acknowledged and filed, and if made within ten days after the assignor's property has been garnished or levied upon, shall operate to vacate such garnishment or levy at the option of the assignee, with certain exceptions. The second section provides for putting an insolvent debtor into involuntary bankruptcy on petition of his creditors, upon his committing certain acts of insolvency, and for the appointment by the court of a receiver with power to take possession of all his property, not exempt, and distribute it among his creditors. Under either section only those creditors receive a benefit from the act who file releases to the debtor of all their demands against him. This statute was held not to conflict with the Federal Constitution in *Denny v. Bennett*, 128 U. S. 489.

The construction given to this act by the Supreme Court of Minnesota has not been altogether uniform. In *Wendell v. Lebon*, 30 Minn. 234, the act was held to be constitutional. It was said that "the act in its essential features is a bankrupt law;" but it was intimated that it included all the debtor's property wherever situated; "and while other jurisdictions might, on grounds of policy, give preference to domestic attaching creditors over foreign assignees or receivers in bankruptcy, yet, subject to this exception, they would, on principles of comity, recognize the rights of such assignees or receivers to the possession of the property of the insolvent debtor."

In *In re Mann*, 32 Minn. 60, the act was, in effect, again pronounced "a bankrupt law, providing for voluntary bankruptcy by the debtor's assignment;" and in this respect differing from a previous assignment law. See also *Simon v. Mann*, 33 Minn. 412, 414.

In *Jenks v. Ludden*, 34 Minn. 482, it was held that the courts of that State had no right to enjoin the defendant, who was a citizen of Minnesota, from enforcing an attachment lien on certain real property in Wisconsin owned by the insolvent debtors, although the execution of the assignment might, under the Minnesota statute, have dissolved such an attachment in that State; and that, even if they had the power to do so, they ought not to exercise their discretion in that case, where the only effect might be to enable non-resident creditors to step in and appropriate the attached property. The court repeated the doctrine of the former case, that the act was a bankrupt act; the assignee being in effect an officer of the court, and the assigned property being in *custodia legis*, and administered by the court or under its direction. The court added: "We may also take it as settled that the question whether property situated in Wisconsin is subject to attachment or levy by creditors, notwithstanding any assignment made in another State, is to be determined exclusively by the laws of Wisconsin." To the same effect see *Daniels v. Palmer*, 35 Minn. 347; *Warner v. Jaffray*, 96 N. Y. 248.

Upon the other hand, in *Covey v. Cutler*, 55 Minn. 18, an insolvent debtor who had made an assignment under this statute, had a certain amount of salt in Wisconsin, which the defendants had attached in a Wisconsin court. The salt was sold upon the judgment, bid in by them, and the assignee in Minnesota brought an action to recover the value of the salt. Defendants answered, claiming that the assignee never took possession of the salt, and that the Minnesota assignment was ineffectual to transfer the title to property in Wisconsin as against attaching creditors there. Plaintiff was held entitled to judgment upon the ground that a voluntary conveyance of personal property, valid by the law of the place, passed title wherever the property may be situated and that such transfers, upon principles of comity, would be recognized as effectual in other States when not opposed to public policy or repugnant to their laws. It is difficult to reconcile this with the previous cases, or with that of *Green v. Van Buskirk*, 7 Wall. 139. The assignment was apparently treated as a voluntary or common law assignment. This ruling was repeated in *Hawkins v. Ireland*, 64 Minn. 339, in which an assignment under this statute was said not to be involuntary but voluntary, and that a court of equity had the power to, and would, restrain one of its own citizens, of whom it had jurisdiction, from prosecuting an action in a foreign State or jurisdiction, whenever the facts of the case made it necessary to do so, to enable the court to do justice and prevent one of its citizens from taking an inequitable advantage of another. This accords with *Dehon v. Foster*, 4 Allen, 545, and *Cunningham v. Butler*, 142 Mass. 47; s. c., *sub nom.* *Cole v. Cunningham*, 133 U. S. 107.

The earlier opinions of the Supreme Court of Minnesota to the effect that the statute in question was a bankrupt act, were followed by the Supreme Court of Wisconsin in *McClure v. Campbell*, 71 Wis. 350, in which it was held that the assignment could have no legal operation out of the State in which the proceedings were had, and that the decision of the Supreme Court of Minnesota that the act of 1881 was a bankrupt act was binding. The contest was between the assignee of the insolvent debtor and a creditor who had attached the property of the insolvent in Wisconsin. The court held that the plaintiff, the assignee, took no title to such property, and was not entitled to its proceeds. In delivering the opinion the court said: "We think the question is not affected by the fact that the property, when seized, was in the possession of the assignee, or that the attaching creditor is a resident of the State in which the insolvency or bankruptcy proceedings were had. . . . While some of them" (the cases) "may, under especial circumstances, extend the rule of comity to such a case, and thus give an extraterritorial effect to somewhat similar assignments, we are satisfied that the great weight of authority is the other way. The rule in this country is, we think, that assignments by operation of law in bankruptcy or insolvency proceedings, under which debts may be compulsorily discharged without full payment thereof, can

have no legal operation out of the State in which such proceedings were had."

In *Franzen v. Hutchinson*, 94 Iowa, 95, 62 N. W. Rep. 698, the Supreme Court of Iowa had this statute of Minnesota under consideration, and held that as the creditors received no benefit under the assignment, unless they first filed a release of all claims other than such as might be paid under the assignment, it would not be enforced in Iowa. It was said that the assignment, which was that of an insurance company, was invalid, and that in an action by the assignee for premiums collected by the defendants, who were agents of the company, the latter could offset claims for unearned premiums held by policy holders at the time of the assignment and by them assigned to defendants after the assignment to plaintiffs.

Notwithstanding the two later cases in Minnesota above cited, we are satisfied that the Supreme Court of that State did not intend to overrule the prior decisions to the effect that the act was substantially a bankrupt or insolvent law. It is true that in these cases a broader effect was given to this act with respect to property in other States than is ordinarily given to statutory assignments, though voluntary in form. But the court was speaking of its power over its own citizens, who had sought to obtain an advantage over the general creditors of the insolvent by seizing his property in another State. There was no intimation that the prior cases were intended to be overruled, nor did the decisions of the later cases require that they should be.

So far as the courts of other States have passed upon the question, they have generally held that any State law upon the subject of assignments, which limits the distribution of the debtor's property to such of his creditors as shall file releases of their demands, is to all intents and purposes an insolvent law; that a title to personal property acquired under such laws will not be recognized in another State, when it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, though the proceedings were instituted subsequent to and with notice of the assignment in insolvency. The provision of the statute in question requiring a release from the creditors in order to participate in the distribution of the estate, operates as a discharge of the insolvent from his debts to such creditors — a discharge as complete as is possible under a bankrupt law. An assignment containing a provision of this kind would have been in many, perhaps in most, of the States void at common law. *Grover v. Wakeman*, 11 Wend. 187; *Ingraham v. Wheeler*, 6 Conn. 277; *Atkinson v. Jordan*, 5 Hamm. 293; *Burrill on Assignments*, 232 to 256. As was said in *Conkling v. Carson*, 11 Ill. 503: "A debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to provide for a preference by assigning his effects; but he is not permitted to say to any of his creditors that they shall not participate in his present estate, unless they release all right to satisfy the residue of their debts out of his future acquisitions." In *Brashear v. West*,

pass title to property both within and without the State, and, in the absence of objections by non-assenting creditors, may authorize the assignee to take possession of the assignor's property wherever found, it cannot be supported as to creditors who have not assented, and who are at liberty to pursue their remedies against such property of the assignor as they may find in other States. *Bradford v. Tappan*, 11 Pick. 76; *Willitts v. Waite*, 25 N. Y. 577; *Catlin v. Wilcox Silver Plate Co.*, 128 Ind. 477, and cases above cited.

We are therefore of opinion that the statute of Minnesota was in substance and effect an insolvent law; was operative as to property in Massachusetts only so far as the courts of that State chose to respect it, and that so far as the plaintiff, as assignee of the D. D. Merrill Company, took title to such property, he took it subservient to the defendants' attachment. It results that the property of the D. D. Merrill Company found in Massachusetts was liable to attachment there by these defendants, and that the courts of Minnesota are bound to respect the title so acquired by them.

The second question must therefore be answered in the negative, and as this disposes of the case, no answer to the first question is necessary.

SECTION IV.

ESTATES IN THE HANDS OF RECEIVERS.

ANON. v. LYNDSEY.

CHANCERY. 1808.

[*Reported 45 Vesey junior, 91.*]

A MOTION was made for the appointment of a receiver upon an estate in the East Indies.

The LORD CHANCELLOR [LORD ELDON], granting the motion, said, the rents should be remitted to some person in England, who may pay them into the bank.

Sir Samuel Romilly, in support of the motion, suggested that as a receiver in India would be out of the jurisdiction, some person in this country should be the receiver, who might appoint his own agent in India.

The LORD CHANCELLOR approved that course, and said, there must

be some provision to prevent the necessity of applying to the court from time to time for permission to let.

A reference was accordingly directed to the Master to inquire what should be the term beyond which the receiver should not be permitted to let.¹

LANGFORD v. LANGFORD.

ROLLS COURT, CHANCERY. 1835.

[Reported 5 *Law Journal, New Series, Chancery*, 60.]

LORD LANGFORD, the defendant in this cause, had executed a settlement by which he charged his Irish estates in favor of the plaintiff, Lady Langford, with the payment of an annuity during her life. The annuity fell into arrear, and the defendant being in England, Lady Langford instituted this suit for an account and a receiver. The defendant resisted a motion for a receiver, on the ground that there were incumbrances prior to the annuity; but in July, 1835, the Master of the Rolls ordered a receiver, who was appointed in October. The order appointing the receiver was duly served on the tenants, with a notice to pay the rents to such receiver, and which they were willing to do. Mr. Murphy, the agent of the defendant, however, served notices on the tenants, to the effect "that the order recently served upon them, as made by the English Court of Chancery, was of no force or effect in Ireland, and that, notwithstanding the service of the said order, his Lordship would require, and if necessary enforce, payment of his rents as heretofore." The defendant, Lord Langford, by his affidavit stated that he had given no authority whatever to his agents in Ireland to demand payment of the rents of the said estate, or to distrain upon the tenants of the said estate; but he admitted that he had instructed his solicitor in Ireland, after giving him notice of the said order made by this court, to oppose, as far as the law would permit, the receivers of such rents and profits from receiving the same. The result of these proceedings was, that the English receiver was unable to obtain payment of any of the rents.²

Mr. Pemberton and *Mr. Bethel* now moved on behalf of the plaintiff, that a commission of sequestration might issue, to sequester the personal estate and the rents and property of the real estate of the defendant, Lord Langford, for the contempt.

Mr. Bickersteth, contra.

¹ A receiver was appointed to take charge of an estate abroad, in the following cases: *Davis v. Barrett*, 13 L. J. N. S. Ch. 304 (real estate in West Indies); *Hinton v. Galli*, 24 L. J. Ch. 121 (real and personal estate in Italy: unopposed). *Contra*, *Kittel v. Augusta*, T. & G. R. R., 78 Fed. 855; *Harvey v. Varney*, 104 Mass. 436. — Ed.

² The statement of facts is slightly condensed. — Ed.

PEPYS, M. R. That this is a contempt I have no doubt. It is true that this court has not the means of sending its officers to carry into effect its orders in Ireland; but it has jurisdiction over all persons in this country, and can compel obedience to its orders. The defendant sends to his solicitors in Ireland to oppose by all lawful means the receiver appointed by this court from receiving the rents. If he meant, by all lawful means in this country, there should be no resistance at all; because a party is not justified in opposing the order of the court; but he says, by all lawful means in Ireland—that is to say, because this court cannot send its process into Ireland, therefore Lord Langford's agent is to use all means in Ireland to oppose the order of the court here. His Honor said he hoped that Lord Langford would see his error, and know that he could not resist the order of this court; and that the order for a sequestration must therefore be made, unless his Lordship ceased to interfere with the officer of the court.

A motion was made on the part of the defendant, before the Lords Commissioners SHADWELL and BOSANQUET, to discharge the order of the Master of the Rolls; when the same was refused, with costs.¹

SHIELDS v. COLEMAN.

SUPREME COURT OF THE UNITED STATES. 1895.

[*Reported 157 United States, 168.*]

THE facts in this case are as follows: On June 6, 1892, in a suit in the Circuit Court of the United States for the Eastern District of Tennessee, brought by John Coleman against the Morristown and Cumberland Gap Railroad Company and Allison, Shafer & Company, an order was entered appointing Frank J. Hoyle receiver of all the property of the railroad company. The bill upon which this order was made alleged that in 1890 the defendant railroad company had contracted with its co-defendants, Allison, Shafer & Company, for the construction of its line of railroad from Morristown to Corryton, a distance of about forty miles, which work was partially completed in February or March, 1892; that there was yet due from the railroad company to Allison, Shafer & Company, more than \$50,000; that Allison, Shafer & Company were indebted to the complainant for work and labor done in the construction of such railroad; that notice, claiming a lien, had been duly given the railroad company, and that it was insolvent, as were also Allison, Shafer & Company. The prayer was for judgment against Allison, Shafer & Company, that the amount thereof be declared a lien upon the railroad property, and for the appointment of a receiver pending the suit.

¹ *Acc. Sercomb v. Catlin*, 128 Ill. 556. — Ed.

In pursuance of this order the receiver took possession of the railroad. On June 8, 1892, the railroad company appeared and filed a petition for leave to execute a bond for whatever sum might be decreed in favor of the complainant and that the order appointing the receiver be vacated. This petition was sustained, the bond given and approved, and an order entered discharging the receiver. Thereupon the receiver turned the property over to the railroad company, receiving the receipt of its general manager therefor.

On June 20, 1892, T. H. McKoy, Jr., filed his petition in the same case, setting up a claim against the railroad company for services rendered as an employé and vice-president of the railroad company, and for expenses incurred on its behalf. On July 4 and July 7, 1892, other petitions were filed setting up further claims against the railroad company.

On July 27, 1892, each of the defendants filed a separate answer to the complainant's bill. No further order was made by the Circuit Court until November 12, 1892, when, as the record shows, a demurrer of the railroad company to the petitions filed on July 4 and July 7 was argued and overruled, and leave given to answer on or before December rules.

Upon complainant's motion for the restoration of the receivership, W. S. Whitney was appointed temporary receiver of the railroad and its property, and was ordered to take custody and control of the property of the railroad company. On November 29, 1892 an amended and supplemental bill was filed, which stated facts sufficient to justify the appointment of a receiver.

On October 28, 1892, a bill was prepared addressed "to the Honorable John P. Smith, chancellor, etc., presiding in the chancery court at Morristown, Tennessee." This bill was in the name of sundry creditors of the railroad company against it, and other parties, setting forth certain judgments in favor of the complainants against the railroad company; its insolvency as well as that of the firm of Allison, Shafer & Company; the existence of a multitude of unpaid claims, and prayed the appointment of a receiver. This bill having been presented to the Honorable Joseph W. Sneed, one of the judges of the State of Tennessee, he issued, on the same day, an order appointing James T. Shields, Jr., temporary receiver, and directed him to take possession of all the property of the company, and to operate the railroad.

This fiat was on the same day filed in the office of the clerk of the chancery court, and the receiver therein named immediately took possession of the railroad property and commenced the operation of the road. His possession continued until November 14, 1892, when the receiver appointed by the Circuit Court of the United States took the property out of his hands.

On January 7, 1893, the Tennessee court continued Shields as permanent receiver, and ordered him to intervene in the present suit.

On January 24, 1893, the receiver J. T. Shields, Jr., in obedience

to the direction of the chancellor, filed his motion in the Circuit Court of the United States, setting forth the facts herein stated, and praying that court to vacate its order appointing W. S. Whitney receiver of the road, and for an order restoring the possession to him. This motion was on January 30, 1893, overruled, and exception duly taken. Subsequent proceedings were had in the Circuit Court culminating on January 31, 1894, in a final decree, which decree established certain liens, and ordered the property to be sold.

Thereafter an appeal to this court was prayed for and allowed in behalf of the receiver appointed by the State court.¹

BREWER, J. The single question presented by this appeal is that of the jurisdiction of the federal court to appoint a receiver, and take the railroad property out of the possession of the receiver appointed by the State court. . . .

Had the Circuit Court of the United States, when this property was in the possession of the receiver appointed by the State court, the power to appoint another receiver and take the property out of the former's hands? We are of opinion that it had not. For the purposes of this case it is unnecessary to decide whether, as between courts of concurrent jurisdiction, when proceedings are commenced in the one court with the view of the appointment of a receiver, they may be continued to the completion of actual possession, and whether, while those proceedings are pending in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of procedure, seize the property, and thus prevent the court in which the proceedings were first commenced from asserting its right to the possession. *Gaylord v. Fort Wayne, &c. Railroad*, 6 Biss. 286-291, cited in *Moran v. Sturges*, 154 U. S. 256-270; *High on Receivers*, 3d ed. § 50. Of course, the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express object, is the appointment of a receiver, and where possession by such officer is necessary for the full accomplishment of the other purposes named therein. The mere fact that, in the progress of an attachment or other like action, an exigency may arise, which calls for the appointment of a receiver, does not make the jurisdiction of the court, in that respect, relate back to the commencement of the action.

In *Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 301, a question was presented as to the time that jurisdiction attaches. Mr. Justice Matthews, after quoting from *Cooper v. Reynolds*, 10 Wall. 308, and *Boswell's Lessee v. Otis*, 9 How. 336, observed: "But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceedings was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some

¹ The statement of facts has been abridged. Part of the opinion, discussing a question of practice, and other parts dealing with the facts, are omitted. — Ed.

assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may, by law, be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

Undoubtedly the Circuit Court had authority under the bill filed June 6, 1892, to make the order appointing the receiver and taking possession of the property. Even if it were conceded that the bill was imperfect and that amendments were necessary to make it a bill complete in all respects, it would not follow that the court was without jurisdiction. The purpose of the bill — the relief sought — was, among other things, the possession of the property by a receiver to be appointed by the court, and when the court adjudged the bill sufficient, and made the appointment, that appointment could not be questioned by another court, or the possession of the receiver thus appointed disturbed. The bill was clearly sufficient to uphold the action then taken.

While the validity of the appointment made by the Circuit Court on June 6, 1892, cannot be doubted, yet, when that court thereafter accepted a bond in lieu of the property, discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching that property.

It is true that the Circuit Court had the power to thereafter set aside its order accepting security in place of the property and enter a new order for taking possession by a receiver, yet such new order would not relate back to the original filing of the bill so as to invalidate action taken by other courts in the meantime. Accepting a bond and directing the receiver to return the property to the owner was not simply the transfer of the possession from one officer of the court to another. The bond which was given was not a bond to return the property if the judgment to be rendered against the contractors was not paid, but a bond to pay whatever judgment should be rendered. It was, therefore, in no sense of the term a forthcoming bond. The property ceased to be *in custodia legis*. It was subject to any rightful disposition by the owner or to seizure under process of any court of competent jurisdiction.

The intervening petitions filed on June 20, July 4, and July 7 are not copied in the record, having been omitted therefrom by direction of the Circuit Court. Evidently, therefore, there was nothing in them which bears upon the question before us, and doubtless they were simply intervening petitions, claiming so much money of the railroad company and containing no reference to the appointment of a receiver.

But it is said that the receiver has no such interest in the property as will give him a standing in the Circuit Court to petition for the restoration of the property to his possession, or to maintain an appeal to this court from an order refusing to restore such possession. This is a mistake. He was the officer in possession by appointment of the State court, the proper one to maintain possession and to take all proper steps under the direction of the court to obtain the restoration of the possession wrongfully taken from him. It is a matter of everyday occurrence for a receiver to take legal proceedings, under the direction of the court appointing him, to acquire possession of property or for the collection of debts due to the estate of which he is receiver. . . .

*The case, therefore, must be remanded to the Circuit Court for further proceedings not inconsistent with this opinion.*¹

HURD v. CITY OF ELIZABETH.

SUPREME COURT OF JUDICATURE, NEW JERSEY. 1879.

[Reported 41 New Jersey Law, 1.]

THE plaintiff brought this suit in his character of receiver of the Third Avenue Savings Bank. The allegations touching his right to sue were the following: "For that the said S. H. Hurd heretofore, to wit, on the thirtieth day of November, eighteen hundred and seventy-five, at the city of Kingston, in the State of New York, to wit, at Elizabeth, in said county of Union, was duly appointed receiver of the Third Avenue Savings Bank, by the Supreme Court of the State of New York, in pursuance of the laws of said State of New York, and afterwards, to wit, on the day and year last aforesaid, duly qualified as such receiver, and thereupon became empowered to exercise and perform all the powers and duties imposed upon him as receiver as aforesaid, by virtue of the laws of the State of New York and said appointment, and particularly by said laws and his said appointment, became seized and possessed of the personal property and choses in action of the said the Third Avenue Savings Bank, and entitled to sue for, collect, and receive all moneys then due to the said the Third Avenue Savings Bank, and particularly the several sums hereinafter mentioned."

The declaration then showed, in the form of common counts, sundry moneys due, antecedently to the receivership, to the savings bank, and concluded in the usual style. The defendant demurred.

BEASLEY, C. J. The plaintiff's right to stand as the actor in this suit is derived wholly from the receivership that was conferred

¹ See *In re Schuyler's Steam Tow Boat Co.*, 136 N. Y. 169, 32 N. E. 623. — Ed.

upon him by the Supreme Court of the State of New York; and on the part of the defendant, such right is contested on the ground that it is contrary to established rules for the courts here to lend their assistance in carrying into effect an office created in the course of a proceeding before a foreign tribunal. To countenance this contention various authorities are cited, and notably among them that of *Booth v. Clark*, 17 How. 322. But that case belongs to a train of decisions which have been undoubtedly rightly decided, but which are not to be regarded as ruling the precise point now in issue. The decisions thus referred to will be found in *High on Receivers*, § 239, and they are all cases involving a controversy between the receiver and the creditors of the person whose property has been placed under the control of such receiver. In such a posture of things it is manifest that different considerations should have force from those that are to control when the litigation does not involve the rights of creditors in opposition to the claims of the receiver. That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this State the assets of the debtor, is a proposition that appears to be asserted by all the decisions; but that, similarly, he should not be permitted to remove such assets when creditors are not so interested, is quite a different affair, and it may, perhaps, be safely said that this latter doctrine has no direct authority in its favor. There are certainly dicta that go even to that extent, so that text-writers seem to have felt themselves warranted in declaring that the powers of an officer of this kind are strictly circumscribed by the jurisdictional limits of the tribunal from which he derives his existence, and that he will not be recognized as a suitor outside of such limits. But I think the more correct definition of the legal rule would be that a receiver cannot sue, or otherwise exercise his functions, in a foreign jurisdiction whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction. There seems to be no reason why this should not be the accepted principle. When there are no persons interested but the litigants in a foreign jurisdiction, and it becomes expedient, in the progress of such suit, that the property of one of them, wherever it may be situated, should be brought in and subjected to such proceeding, I can think of no objection against allowing such a power to be exercised. It could not be exercised in a foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied. But beyond this precaution, why should any restraint be put upon the foreign procedure? The question thus raised has nothing to do with that other inquiry that is frequently discussed in the books, whether a receiver at common law is in point of fact clothed with the power to sue in a foreign jurisdiction; that is a subject standing by itself, for the present argument relates to a case in which the officer is

authorized, so far as such power can be given by the tribunal appointing him, to gather in the assets, both at home and abroad. Conceding that the officer is invested with this fulness of authority, it would appear to be in harmony with those legal principles by which the intercourse of foreign States is regulated for every government, when its tribunals are appealed to, to render every assistance in its power in furtherance of the execution of such authority, except in those cases when, by so doing, its own policy would be displaced or the rights of its own citizens invaded or impaired. After completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided. The appointment of a receiver, with full powers to collect the property of a litigant, wherever the same might be found, should be deemed to operate as an assignment of such property to be enforced everywhere, subject to the exception just defined. Such a rule is, I think, both practicable and just. If A., being the only creditor of B., should sue him in a court of this State, and the exigencies of justice should require that the property of B., wherever the same might be situated, should be put under the control of the forum in which the proceedings were pending, and such receiver should be appointed and should be legally clothed with the requisite authority to sue for, and take possession of such property, I can find nothing in the rules of law or of good policy that should permit the debtors of B. to set up that such judgment has no extraterritorial force. To sanction such a plea would be to frustrate, as far as possible, the foreign procedure, simply for the purpose of doing so, the single result being that a court would be baffled, and perhaps prevented from doing justice. Such ought not to be the legal attitude of governments towards each other. To the extent to which this subject has been involved, it has, I think, been properly disposed of in the adjudications already made in this State. Thus in *Varnum v. Camp*, 1 Green, 326, it was decided that an instrument efficient at the domicile of the maker to transfer his property could not dispose, in a manner inconsistent with the policy of our laws, of his movables situate here. In this case the duty of comity was admitted, but the decision was put upon the ground that this State was not required, by force of such duty, to abandon an established policy of its own in favor of a different policy prevalent in another jurisdiction. *Moore v. Bonnell*, 2 Vroom, 90, was decided on a similar principle, and it has this additional feature, that while it in a general way rejects the control of the foreign policy, it does this only to the extent rendered necessary for the purpose of self-protection, for, beyond this limit, it gives effect to and enforces the foreign law. And the same disposition to co-operate, as far as practicable, in sustaining an alien policy is exhibited in the case of *Normand's Administrator v. Groggnard*, 2 C. E. Green, 425. The foregoing view will be found to be in accord with the following cases: *Hoyt v. Thompson*, 1 Seld. 820; *Runk v.*

St. John, 29 Barb. 585; Taylor *v.* Columbian Insurance Co., 14 Allen, 353.

In view of these considerations and authorities my conclusion is, that the legal effect of the appointment of a receiver in a foreign jurisdiction in transferring to him the right to collect the property passing under his control by virtue of such office, will be so far recognized by the courts of this State as to enable such officer to sustain a suit for the recovery of such property.

But it is also said that the declaration is substantially defective. It is certainly informal and so imperfect that upon motion it would have been set aside; and the only question is, whether, by force of our statute, it may not be supported as against a general demurrer. The defects of this pleading are very marked. For example: the appointment of a receiver is a measure incidental to a suit, and yet the pendency of such a suit is not shown, the curt averment being that the plaintiff, at a certain date, was appointed to such office by the Supreme Court of the State of New York. So the capacities of the receiver and his right to sue is in the form rather of a deduction of the pleader than the statement of a fact. I can find nothing analogous to such a course in any of the precedents of pleading. Still, as the imperfections of this declaration could readily have been objected to on motion, which has taken the place of a special demurrer, and as it is not entirely clear whether such imperfections are matters of substance or matters of form, I have concluded that the demurrer ought not to be sustained.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY *v.*
KEOKUK NORTHERN LINE PACKET CO., CLUBB,
INTERPLEADER.

SUPREME COURT OF ILLINOIS. 1883.

[*Reported 108 Illinois, 317.*]

THIS was an attachment suit, brought by the Chicago, Milwaukee and St. Paul Railway Company, against the Keokuk Northern Line Packet Company, in the Circuit Court of Adams County, in this State. The writ of attachment was, on the 21st day of April, 1881, levied upon the barge "G. W. Duncan," lying at Quincy, in said county, as the property of the defendant. Samuel C. Clubb, under the provision of section 29 of our Attachment Act, "that any person other than the defendant claiming the property attached may interplead," etc., interpleaded in the case, claiming the property so attached, under an appointment as receiver of the property and effects of said packet company, by the Circuit Court of St. Louis, in the State of Missouri, in a certain cause in said court wherein said packet company was defendant. There was judgment in favor of the interpleader, Clubb, which, on appeal, was affirmed by the Appellate Court for the Third District, and the railway company appealed to this court.

The plaintiff in the attachment suit had first filed a replication to the pleas of the interpleader, traversing the same, but afterward, on its motion granted by the court, it withdrew the replication, as having been filed by mistake, and then moved the court to file its plea in abatement, which had been intended to be filed instead of the replication, denying the right to interplead as receiver under the appointment of a foreign court, which motion the court overruled, whereupon said plaintiff company filed the plea in abatement, which plea the court, on motion of said Clubb, ordered to be stricken from the files. The plaintiff company then refiled its said replication, upon which issue was joined and the trial had. The interpleader's first plea alleges the barge was his own property at the time of the attachment of it; the second, that it was his property as receiver; the third, that at such time it was in his possession as receiver.

The facts of the case shown by the evidence are, that at the October term, 1880, of the Circuit Court of the city of St. Louis, in the State of Missouri, Samuel C. Clubb was duly appointed receiver of the Keokuk Northern Line Packet Company, an insolvent corporation of that State, with power and authority to take possession of all the business and property of the corporation, and to manage the affairs thereof, under the orders of the court, the receiver giving bond in the sum of \$200,000 for the faithful discharge of his duties. At the time of such appointment the barge "G. W. Duncan," in question, was lying at the land-

ing at St. Louis, within the State of Missouri, and within the jurisdiction of said court. The receiver immediately took possession of the barge, and afterward, on the 6th day of November, 1880, he chartered the barge to the steamer "E. W. Cole," for a trip up the Mississippi River and return. The barge was taken, under the charter, up the river as far as Quincy, Illinois, where it was detained by the ice, and remained until the levy of the writ of attachment in this case upon it on the 21st day of April, 1881. At the request of the captain of the steamer "E. W. Cole," the receiver released him from the charter, and took possession of the barge at Quincy, and ever since, until the levy of the attachment, retained such possession, having a watchman over and guarding the barge against danger. The receiver made an effort to have the barge removed to St. Louis as soon as the river was clear of ice, having made a contract with a steamboat line for the purpose, but did not succeed in having the removal made before the attachment. The court which appointed the receiver, at its April term, 1881, made an order authorizing the receiver to intervene in the attachment suit, and take the necessary steps to secure possession of the barge.¹

SHELDON, C. J. We will consider the case as properly presenting by the pleadings the question of the right to interplead in the suit in the capacity of receiver.

The general doctrine that the powers of a receiver are coextensive only with the jurisdiction of the court making the appointment, and particularly that a foreign receiver should not be permitted, as against the claims of creditors resident in another State, to remove from such State the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied, we fully concede; and were this the case of property situate in this State, never having been within the jurisdiction of the court that appointed the receiver, and never having been in the possession of the receiver, it would be covered by the above principles, which would be decisive against the claim of the appellee. But the facts that the property at the time of the appointment of the receiver was within the jurisdiction of the court making the appointment, and was there taken into the actual possession of the receiver, and continued in his possession until it was attached, take the case, as we conceive, out of the range of the foregoing principles. We are of opinion that by the receiver's taking possession of the barge in question within the jurisdiction of the court that appointed him, he became vested with a special property in the barge, like that which a sheriff acquires by the seizure of goods in execution, and that he was entitled to protect this special property while it continued, by action, in like manner as if he had been the absolute owner. Having taken the property in his possession, he was responsible for it to the court that appointed him, and had given a bond in a large sum to cover his responsibility as receiver, and to meet such liability he might maintain

¹ Arguments of counsel are omitted. — ED.

any appropriate proceeding to regain possession of the barge which had been taken from him. *Boyle v. Townes*, 9 Leigh, 158; *Singerly v. Fox*, 75 Pa. 114. It is well settled that a sheriff does, by the seizure of goods in execution, acquire a special property in them, and that he may maintain trespass, trover, or replevin for them.

It is claimed that there was here an abandonment of the barge by leasing it and suffering it to be taken out of the State, — that the purpose in so doing was an unlawful one, and a gross violation of official duty. We do not so view it. The receiver was, by his appointment, authorized to manage the affairs of the corporation under the orders of the court. The business of the corporation was running boats on the Mississippi River, and chartering the barge for a trip up that river was but continuing the employ of the barge in the business of the corporation, and therefrom making an increase of the assets to be distributed among the creditors. *Brownell v. Manchester*, 1 Pick. 233, decides that a sheriff in the State of Massachusetts, who had attached property in that State, did not lose his special property by removing the attached property into the State of Rhode Island for a lawful purpose. *Dick v. Bailey et al.* 2 La. Ann. 974, holds otherwise in respect to property attached in Mississippi, and sent by the sheriff into Louisiana for an illegal purpose. It is laid down in *Drake on Attachment* (5th ed.), § 292, that the mere fact of removal by an officer of attached property beyond his bailiwick into a foreign jurisdiction, without regard to the circumstances attending it, will not dissolve the attachment; that if the purpose was lawful, and the possession continued, the attachment would not be dissolved; but if the purpose was unlawful, though the officer's possession remained, or if lawful and he lost his possession, his special property in the goods would be divested, — citing the two cases above named. We do not consider that there was any unlawful purpose here in the chartering and employing of the barge, as was done.

It is insisted the possession of the barge was lost. There was certainly evidence tending to show possession by the receiver up to the time of the attachment, and in support of the judgment of the Appellate Court we must presume that it found the existence of all the facts necessary to sustain the judgment, where there was evidence tending to show their existence, and that court's finding of fact is conclusive upon us. By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver, and it is the established rule that where a legal title to personal property has once passed and become vested in accordance with the law of the State where it is situated, the validity of such title will be recognized everywhere. *Caniwell v. Sewell*, 5 Hurl. & N. 728; *Clark v. Connecticut Peat Co.*, 35 Conn. 303; *Taylor v. Boardman*, 25 Vt. 581; *Crapo v. Kelly*, 16 Wall. 610; *Waters v. Barton*, 1 Cold. (Tenn.) 450.

Under this rule we hold that where a receiver has once obtained

rightful possession of personal property situated within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession, though he take it, in the performance of his duty, into a foreign jurisdiction; that while there it cannot be taken from his possession by creditors of the insolvent debtor who reside within that jurisdiction. Where a receiver of an insolvent manufacturing corporation, appointed by a court in New Jersey, took possession of its assets, and for the purpose of completing a bridge which it had contracted to build in Connecticut, purchased iron with the funds of the estate and sent it to that State, it was decided that the iron was not open to attachment in Connecticut by a creditor residing there. *Pond v. Cooke*, 45 Conn. 126. And where C. was appointed, by a court in Arkansas, receiver of property of T., a defendant in a suit, and ordered to ship it to Memphis, for sale, and to hold the proceeds subject to the order of the court, and did so ship it to Memphis, where it was attached by creditors of T., it was held that C. could maintain an action of replevin for the property in Tennessee. *Cagill v. Wooldridge*, 8 Baxter, 580. *Kilmer v. Hobart*, 58 How. Pr. 452, decides that receivers appointed in another State, and operating a railway as such, but having property in their hands as receivers in New York, cannot there be sued, — that an attachment issued in such suit will be vacated.

This is not the case of the officer of a foreign court seeking, as against the claims of creditors resident here, to remove from this State assets of the debtor situate here at the time of the officer's appointment, and ever since, and of which he had had no previous possession. It is to such a case as that, as we understand, that the authorities cited by appellant's counsel apply, and not to a case like the present, where the property was, at the time of the appointment of the foreign receiver, within the jurisdiction of the appointing court, and there taken into the receiver's possession, and subsequently suffered by him to be brought into this State in the performance of his duty, and his possession here wrongfully invaded, and he seeking but redress for such invasion.

The judgment of the Appellate Court must be affirmed.

*Judgment affirmed.*¹

¹ *Acc. Robertson v. Stead*, 135 Mo. 135, 36 S. W. 610; *Osgood v. Maguire*, 61 N. Y. 524; *Cagill v. Wooldridge*, 8 Baxt. 580; 16 Clunet, 725 (Denmark, 14 Feb. '87). *Contra*, *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892. Where a voluntary assignment is made by the debtor to the receiver, it will be treated like any case of voluntary assignment, and the receiver's rights recognized. *Graydon v. Church*, 7 Mich. 36; *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 64 N. W. 751.

A fortiori, when the right was never in the debtor, but accrued to the receiver, he may sue in any jurisdiction upon his individual right. Thus he may sue for property bought by him: *Pond v. Cooke*, 45 Conn. 126; upon a judgment obtained by him: *Wilkinson v. Culver*, 25 Fed. 639; to foreclose a mortgage made to him: *Inglehart v. Bierce*, 36 Ill. 133; and to enforce the terms of a contract, made with the corporation of which he is the receiver, but performed on his side by himself under an ar-

CHAPTER XV.

JUDGMENTS.

SECTION I.

THE NATURE OF A JUDGMENT.

SAWYER v. MAINE FIRE AND MARINE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[Reported 12 Massachusetts, 291.]

THIS was an action of the case upon a policy of insurance, dated March 20th, 1812, for \$6,000 upon the brig "Lydia," valued at \$7,000, at and from Portland to one or more ports in the West Indies, and at and from thence to her port of discharge in the United States, against capture and condemnation only. The plaintiffs declared for a total loss by capture, in the first count, by a vessel unknown, belonging to citizens of Hispaniola; and in the second count by pirates, rovers, &c., on the 19th of April, 1812.

On the trial before PUTNAM, J., at the sittings here by adjournment of the last October term, it appeared that proof of the loss was made, and an abandonment offered, on the 14th of May, 1812. The policy and interest were admitted.

The plaintiffs proved that, at the time of making the insurance, it was stated to the defendants that the vessel was bound to Port au Prince. They also read the deposition of Elisha Sawyer (a copy of which came up in the case), stating that he was master of the said vessel on the voyage insured: that on arriving in sight of Port au Prince he was hailed by an armed brig belonging to the king of Hayti, and ordered to come on board. The captain then informed the witness that he was fighting against Petion, who had possession of Port au Prince, that the king of Hayti wanted his provisions, and that if he, the witness, would go to St. Mark's, he should have a good price for his cargo; but that if he refused he should send him. On the witness refusing, a prize master and five men were put on board the brig, and an armed schooner accompanied her to St. Mark's. On his arrival there he was ordered on shore, and was carried before the prince Gonaive, who said he wanted the cargo, and would pay the witness for it. The prince then ordered the sails taken from the brig and

rangement with the other party: *Cooke v. Orange*, 48 Conn. 401; and still more clearly to enforce a contract made as well as performed by himself: *Merchants' Nat. Bank v. Pennsylvania Steel Co.*, 57 N. J. L. 336, 30 Atl. 545. — Ed.

brought on shore, and twelve men were placed on board. The witness then went on board the vessel, and on the third day after was, with all his crew, ordered on shore; and on being carried before the minister of justice so called, he read to them a condemnation of the vessel and cargo. The next day the vessel was sold and the cargo taken out and put into the king's warehouse. The vessel was purchased by Messrs. Dodge and Myers, of Philadelphia, for the master, at the price of \$4,000, and he went in her to Philadelphia, where he sold her. He had never heard of the blockade of Port au Prince before his capture. The king of Hayti and all his officers were black, except his majesty's interpreter, who was a mulatto. The principal facts in the master's deposition were confirmed by the testimony of the mate of the vessel. The defendants produced a copy of the condemnation, which came up in the case, and contended that it thereby appeared that the brig was condemned for a violation of the blockade of Port au Prince by the emperor of Hayti; and that the decree was to be considered as conclusive evidence of the facts thereby decided.

There was no evidence that Port au Prince was in fact blockaded at the time of the capture, other than what arises from the said decree of condemnation. Nor was there any evidence that the brig was notified of any blockade, or warned not to enter for that cause prior to the capture. The collector of the customs for the district of Portland testified that, since the expiration of the law of the United States prohibiting intercourse with St. Domingo, many clearances had been made from the United States for Port au Prince, and many clearances from Hayti to the United States. It was in evidence that Christophe, or Henry, was the sovereign *de facto* of Cape François and of that part of the island; and that Petion was the sovereign *de facto* of Port au Prince; that Petion and Christophe are at war with each other, each declaring the other to be in rebellion against France; but each claiming to have authority in his own dominions: that they have their custom houses and custom house officers: and ships of many nations, English, Spanish, American, &c. trade there, and business is regularly transacted; that the United States have had a consul at Cape François, since the government has been in rebellion against France: particularly that Col. Lear was consul there when Toussaint was regent: that protests, decrees, and other proceedings of the admiralty courts from Cape François are frequently seen in the United States: and that a proclamation of the blockade of Port au Prince by Christophe, or king Henry, was published here in June, 1812.¹

The judge instructed the jury that the decree must be considered as conclusive evidence that the vessel was condemned for violation of blockade.

The jury accordingly returned a verdict for the defendants, which was taken subject to the opinion of the court in the premises. If that

¹ Part of the statement of facts and part of the opinion, involving the claim of partial loss, are omitted. — Ed.

opinion should be, that the said decree does decide and is conclusive evidence of a violation of blockade by the vessel the verdict was to stand: otherwise the defendants were to be defaulted, and judgment was to be rendered for a total or partial loss, in such sum as, upon the facts before stated, the court should determine the plaintiffs ought to recover.

PARKER, C. J. The decree offered in this case, as conclusive evidence of a violation of blockade by the vessel insured, cannot be held so to operate. Indeed it may be doubtful whether it ought to have been admitted at all.

Waiving all question as to the character of the government, under which the seizure of the vessel and the decree of forfeiture took place, it certainly is essentially defective when attempted to be applied to this contract of insurance.

For it does not appear that any libel was filed, any monition issued, any hearing had, or that any of those formalities had taken place, which are necessary to give a conclusive operation to decrees of foreign courts. For aught that appears from the copy of the proceedings before us, the forfeiture was decreed by mere arbitrary power, without any trial; and that some of the forms of justice, used in civilized countries, had been assumed, without any regard to the substantial requisites of a judicial inquiry.

Considering the decree then as not conclusive, the facts, which it purports to establish, are abundantly disproved by the other testimony in the case: so that the seizure of the vessel must be taken to have been an act of unjustifiable violence, for which the underwriters are undoubtedly answerable. . . .

Defendants defaulted.

PAINE v. SCHENECTADY INSURANCE CO.

SUPREME COURT OF RHODE ISLAND. 1877.

[*Reported 11 Rhode Island, 411.*]

DURFEE, C. J. This is an action of assumpsit to recover damages for breach of contract. It was commenced in the court of Common Pleas, August 27, 1870. The plaintiff recovered judgment in that court at the December Term, 1875. The defendant appealed to this court at the March Term, 1876. May 13, 1876, the defendant filed a plea *puis darrein continuance*, setting forth that on the 8th May, 1876, George T. Hanford, who had been duly appointed receiver of the goods and effects of the defendant, had impleaded the plaintiff in the Supreme Court, in the State of New York, and recovered judgment against him for \$1,878.11, and costs, "which still remains in full force and effect, not in any wise reversed, annulled, discharged, or satisfied." The plea sets forth the proceeding in the New York suit, showing that the plaintiff therein pleaded in set-off the matters involved in this case, and

avers that the cause of action and the issue raised by the pleadings are the same in both suits, and that the parties are identical. To this plea the plaintiff demurs, assigning four causes of demurrer.

The first cause is, that the suit set forth in the plea is not alleged to have been instituted before the commencement of the present suit. And in his brief, the counsel for the plaintiff contends that there is no precedent for such a plea where the judgment was recovered by the defendant, or was recovered in a suit commenced subsequently to the suit in which it was pleaded.

We do not see that it makes any difference which party has recovered judgment. The true question is, whether the controversy has been determined by a competent tribunal having jurisdiction; for, if it has been, the defendant has the right to insist that it shall not be further prosecuted, unless for some technical reason he cannot have the benefit of the estoppel. The plaintiff says he cannot have the benefit of the estoppel because the suit in this State was first commenced. Is this so? We think not. The defendant had the right to sue the plaintiff in New York, notwithstanding the plaintiff had sued him in Rhode Island. The plaintiff, in defending against the New York suit, put in issue the same controversy which was in issue in the Rhode Island suit, and it was decided against him. Why should he not be concluded, and, if concluded, why should not the defendant have the benefit of the conclusion by plea *puis darrein*? If the judgment in New York had been recovered before the suit in Rhode Island, the defendant would certainly have been entitled to plead it. Indeed, such a judgment would be pleadable in bar if recovered in a foreign country, and *a fortiori*, under the Federal Constitution and law, when recovered in a sister State. *Ricardo v. Garcias*, 12 Cl. & Fin. 368; *Bissell v. Brigg*, 9 Mass. 462; *Mills v. Duryee*, 7 Cranch, 481; 2 Am. Lead. Cas. (5th ed.) 611 *et seq.*, where this subject is discussed, and the cases fully cited.

The two cases of *Baxley v. Linah*, 16 Pa. St. 241, and *North Bank v. Brown*, 50 Me. 214, are closely in point. In *Baxley v. Linah*, 16 Pa. St. 241, an action was commenced in Maryland, December 30, 1846, and in Pennsylvania, for the same cause, June 2, 1847. The defendant pleaded the prior pendency of the Maryland action in abatement to the Pennsylvania action, and the plea was overruled, the plea of prior pendency being available only when both actions are pending in the same State. *Bowne et al. v. Joy*, 9 Johns. Rep. 221; *Walsh et al. v. Durkin*, 12 Johns. Rep. 99. Subsequently, January 31, 1848, the plaintiff recovered judgment against the defendant in the Maryland action; and December 5, 1849, the defendant pleaded it in bar *puis darrein continuance*. The plaintiff demurred. The court, however, sustained the plea.

The only material difference between that case and the case at bar is, that there the judgment was recovered first in the earlier case, here in the later. But the judgment, whenever recovered, is still a judg-

ment; and why, then, is it not pleadable as such? In *North Bank v. Brown*, 50 Me. 214, the plaintiff commenced suit against the defendant in Maine, January 11, 1858; and in New York for the same cause, January 21, 1858. Judgment was first obtained in the New York suit, and it was held to be a good defence to the suit in Maine. Here the judgment does not appear to have been specially pleaded; but if it had been specially pleaded, we see no reason why the decision would not have been the same. We think the first cause of demurrer is not sufficient.¹

The second cause is, that it does not appear that the New York suit was prosecuted by or for the defendant corporation, or by its authority, or for its benefit.

The plea sets forth that the New York suit was prosecuted by George T. Hanford, as receiver of the goods and effects of the defendant, and avers that the parties are identical; meaning, doubtless, that they are in legal effect the same. We infer from this that, under the laws of New York, the receiver, for the purposes of his appointment, is virtually the corporation, and that therefore a suit by him as receiver is, in legal effect, a suit by the corporation. We the more readily infer that the law is so in New York, because it is so in this State. We think, when the judgment of a sister State is pleaded, we ought not to be too strict or technical; but that we ought to administer the law in a spirit of liberal comity, and to allow the plea every fair intendment, so as not to defeat the constitutional privilege of the judgment. If this suit were pending in New York such a judgment would doubtless be a bar to it. We think, therefore, that the second cause of demurrer cannot be sustained.

The third cause of demurrer is substantially the same as the second, and is for the same reason overruled.

The fourth cause is, that the cause of action in the two suits does not appear to be identical. The plea avers that it is identical, and we do not find, from an examination of the judgment as pleaded, any sufficient reason to think it is not so. See *Ricardo v. Garcias*, 12 Cl. & Fin. 368, 401.

The plaintiff states in his brief that an appeal has been taken from the judgment rendered in New York. The plea, however, does not show this. *Prima facie* the judgment as pleaded appears to be final and conclusive. Upon demurrer, we can only know what the plea discloses. If the plaintiff desires us to decide upon the effect of the appeal, he should bring the fact of the appeal before us by proper pleading and proof.

Upon the question whether the court can take cognizance of the

¹ *Acc. Cox v. Mitchell*, 7 C. B. N. s. 55; *Memphis & C. R. R. v. Grayson*, 88 Ala. 572, 7 So. 122; *SeEVERS v. Clement*, 28 Md. 426; *Whiting v. Burger*, 78 Me. 287; *Lane v. Hanson*, 25 Can. 69. See the *Santissima Trinidad*, 7 Wheat. 283, 355; *Lyman v. Brown*, 2 Curt. 559; *Thorpe v. Sampson*, 84 Fed. 63. — ED.

New York law as to the effect of an appeal, unless pleaded and proved, see 2 Am. Lead. Cas. (5th ed.) 648 *et seq.*

Demurrer overruled.

After the foregoing opinion, the plaintiff replied to the plea *puis darrein continuance*:—

1. That the judgment of the Supreme Court of New York set forth in the plea had been appealed from, and that the suit wherein judgment had been given was consequently pending in the Supreme Court of New York.

2. That the receiver Hanford acted without authority, and did not institute the New York suit in behalf of the defendant corporation but for himself.

3. That the cause of action in the New York suit was not that in the present case.

All these replications concluded to the country. The defendant demurred to them all.

DURFEE, C. J. This is an action of assumpsit to which the defendant pleads in bar a former judgment recovered in the Supreme Court of the State of New York. The plaintiff replies that the judgment has been appealed from by him, and the suit is still pending in the court. The defendant demurs to the replication.

The defendant contends that by the law of New York an appeal does not vacate the judgment appealed from, but leaves it, until annulled or reversed, conclusive upon the parties.

Two questions arise upon the demurrers:—

1. The first question is, whether we can take judicial cognizance of the law of New York, or must presume it to be the same as ours until it is shown by averment and proof to be different. The decisions upon this point are conflicting, but we think the decision of the Supreme Court of Pennsylvania, in *The State of Ohio v. Hinchman*, 27 Pa. St. 479, rests upon the better reason. The court there held that, when the judgment impleaded is the judgment of a sister State, the court will notice *ex officio* the law of the State in which it was rendered. The reason given for this is, that, in such a case, the court acts under the Constitution and laws of the United States, which require that the judgment shall have in every State the same faith and credit which it has in the State where it was originally rendered. In such a case, it was said, the decision of the State court is reëxaminable in the Supreme Court of the United States, which will, without averment or proof, take cognizance of the law of the State in which the record originates. "It would be a very imperfect and discordant administration," it was further said, "for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows, that in questions of this sort we should take notice of the local laws of a sister State in the same manner the Supreme Court of the United States would do on a writ of error to our judgment." See also

Baxley v. Linah, 16 Pa. St. 241; *Rae v. Hulbert*, 17 Ill. 572, 578; *Butcher v. The Bank of Brownsville*, 2 Kans. 70; 2 Am. Lead. Cas. 648 *et seq.* We think the reasoning is sound, and that it is not satisfactorily met by courts which adopt a different view. *Rape v. Heaton*, 9 Wis. 328, 341.

2. The second question relates to the conclusiveness of the judgment. We find, as claimed by the defendant, that by the law of New York an appeal, though it may stay the execution when proper security is given, does not affect the conclusiveness of the judgment so long as it remains unreversed. A judgment so appealed from is a valid bar to an action involving the same controversy. *Sage v. Harpending*, 49 Barb. S. C. 166; *Harris v. Hammond*, 18 How. Pr. 123; *Rathbone v. Morris*, 9 Ab. Pr. 213; *Freeman on Judgments*, § 328. If the judgment would be a good bar to this action in New York, it is entitled to have the same effect in this State. *Mills v. Duryee*, 7 Cranch, 481; *McElmoyle v. Cohen*, 13 Pet. 312; *Jacquette v. Hugunon*, 2 McLean, 129. The case of *Bank of North America v. Wheeler*, 28 Conn. 433, is a case exactly in point. After the commencement of that case in Connecticut, a judgment was recovered for the same cause of action in New York, and it was held that the judgment, notwithstanding it had been appealed from, was a good bar to the suit in Connecticut; it being found that, by the law of New York, the appeal operated only as a proceeding in error and did not vacate the judgment. We think, therefore, that the demurrer to the first replication must be sustained.

We will add, however, as matter of practice, that we think the pendency of the appeal in New York may be good ground for delaying judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time.

There are two other replications which are demurred to; but we think they raise issues of fact, which the plaintiff is entitled to have tried. The demurrers to them are, therefore, overruled.¹

¹ *Acc.* *Scott v. Pilkington*, 2 B. & S. 11; *Taylor v. Shew*, 39 Cal. 536; *Bank of North America v. Wheeler*, 28 Conn. 433; *Tompkins v. Cooper*, 97 Ga. 631, 25 S. E. 247; *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Faber v. Hovey*, 117 Mass. 107; *Loneragan v. Lonergan*, 55 Neb. 641, 76 N. W. 16; *Merchants' Ins. Co. v. DeWolf*, 33 Pa. 45; *Piedmont & A. L. Ins. Co. v. Ray*, 75 Va. 821; *Ferland v. Dreyfus* (Naples), 1 Ann. Giur. Ital. 1, 120. See *Heckling v. Allen*, 15 Fed. 196. — Ed.

SECTION II.

THE OBLIGATION OF A JUDGMENT.

GODARD v. GRAY.

COURT OF QUEEN'S BENCH. 1870.

[*Reported Law Reports, 6 Queen's Bench, 139.*]

BLACKBURN, J.¹ In this case the plaintiffs declare on a judgment of a French tribunal, averred to have jurisdiction in that behalf.

The question arises on a demurrer to the second plea, which sets out the whole proceedings in the French court. By these it appears that the plaintiffs, who are Frenchmen, sued the defendants, who are Englishmen, on a charterparty made at Sunderland, which charterparty contained the following clause, "Penalty for non-performance of this agreement, estimated amount of freight." The French court below, treating this clause as fixing the amount of liquidated damages, gave judgment against the defendants for the amount of freight on two voyages. On appeal, the Superior Court reduced the amount to the estimated freight of one voyage, giving as their reason that the charterparty itself "*fixait l'indemnité à laquelle chacune des parties aurait droit pour inexécution de la convention par la faute de l'autre ; que moyennant paiement de cette indemnité chacune des parties avait le droit de rompre la convention,*" and the tribunal proceeds to observe that the amount thus decreed was after all more than sufficient to cover all the plaintiffs' loss.

All parties in France seem to have taken it for granted that the words in the charterparty were to be understood in their natural sense; but the English law is accurately expressed in Abbott on Shipping, part 3, c. 1, s. 6, 5th ed., p. 170, and had that passage been brought

¹ The statement of facts and arguments of counsel are omitted. — Ed.

to the notice of the French tribunal, it would have known that in an English charterparty, as is there stated, "Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause, he cannot, in effect, recover more than the damage actually sustained." But it was not brought to the notice of the French tribunal that according to the interpretation put by the English law on such a contract, a penal clause of this sort was in fact idle and inoperative. If it had been, they would, probably, have interpreted the English contract made in England according to the English construction. No blame can be imputed to foreign lawyers for not conjecturing that the clause was merely a *brutum fulmen*. The fault, if any, was in the defendants, for not properly instructing their French counsel on this point.

Still the fact remains that we can see on the face of the proceedings that the foreign tribunal has made a mistake on the construction of an English contract, which is a question of English law; and that, in consequence of that mistake, judgment has been given for an amount probably greater than, or, at all events, different from that for which it would have been given if the tribunal had been correctly informed what construction the English contract bore according to English law.

The question raised by the plea is, whether this is a bar to the action brought in England to enforce that judgment, and we are all of opinion that it is not, and that the plaintiff is entitled to judgment.

The following are the reasons of my Brother MELLOR and myself. My Brother HANNEN, though agreeing in the result, qualifies his assent to these reasons to some extent, which he will state for himself.

It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England and in those States which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams v. Jones*, 13 M. & W. 633: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced." And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the

jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may show that the judgment was obtained by the fraud of the plaintiff, for that would show that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the foreign court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him; but we prefer to imitate the caution of the present Lord Chancellor, in *Castrique v. Imrie*, Law Rep. 4 H. L. 445, and to leave those questions to be decided when they arise, only observing that in the present case, as in that, "the whole of the facts appear to have been inquired into by the French courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in France in deciding as they did decide."

There are a great many dicta and opinions of very eminent lawyers, tending to establish that the defendant in an action on a foreign judgment is at liberty to show that the judgment was founded on a mistake, and that the judgment is so far examinable. In *Houlditch v. Donegall*, 2 Cl. & F. 477, Lord Brougham goes so far as to say: "The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers; it is their decision that in this country a foreign judgment is only *prima facie*, not conclusive evidence of a debt." But there certainly is no case decided on such a principle; and the opinions on the other side of the question are at least as strong as those to which Lord Brougham refers.

Indeed, it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of pleading shows that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negating the existence of that original cause of action.

If, on the other hand, there is a *prima facie* obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal.

But we think it unnecessary to discuss this point, as the decisions of the Court of Queen's Bench in *Bank of Australasia v. Nias*, 16 Q. B. 717; 20 L. J. (C. P.) 284, of the Court of Common Pleas in *Bank of Australasia v. Harding*, 9 C. B. 661, 19 L. J. (C. P.) 345, and of the Court of Exchequer in *De Cosse Brissac v. Rathbone*, 6 H. & N. 301, 30 L. J. (Ex.) 238, seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law.

But there still remains a question which has never, so far as we know, been expressly decided in any court.

It is broadly laid down, by the very learned author of *Smith's Leading Cases*, in the original note to *Doe v. Oliver*, 2 Sm. L. C. 2d ed. 448, that "it is clear that if the judgment appear on the face of the proceedings to be founded on a mistaken notion of the English law," it would not be conclusive. For this he cites *Novelli v. Rossi*, 2 B. & Ad. 757, which does not decide that point, and no other authority; but the great learning and general accuracy of the writer makes his unsupported opinion an authority of weight; and accordingly it has been treated with respect. In *Scott v. Pilkington*, 2 B. & S. 42; 31 L. J. (Q. B.) 89, the court expressly declined to give any opinion on the point not then raised before them. But we cannot find that it has been acted upon; and it is worthy of note that the present very learned editors of *Smith's Leading Cases* have very materially qualified his position, and state it thus, if the judgment "be founded on an incorrect view of the English law, knowingly or perversely acted on;" the doctrine thus qualified does not apply to the present case, and there is, therefore, no need to inquire how far it is accurate.

But the doctrine as laid down by Mr. Smith does apply here; and we must express an opinion on it, and we think it cannot be supported, and that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact.

It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law, and any other mistake. No doubt the English court can, without arrogance, say that where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had arisen as to the law of some of the numerous por-

tions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be more likely to be right than the English court; if inquiring into the law of Scotland it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland the chances as to which court was right would be altered. Yet it surely cannot be said that a judgment shown to have proceeded on a mistaken view of Scotch law could be enforced in England and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland but not in England.

If, indeed, foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to inquire whether the foreign court had made a mistake, or to allow the defendant to assert that it had, yet that if the foreign court itself admitted its blunder they would not then act: but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defence which shows that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can show did exist.

The whole law was much considered and discussed in *Castrique v. Imrie*, Law Rep. 4 H. L. 414, 448, where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship. The decision of the House of Lords was, that the defendant's title derived under that sale was good, notwithstanding that mistake: Lord Colonsay pithily saying, "It appears to me that we cannot enter into an inquiry as to whether the French courts proceeded correctly, either as to their own course of procedure or their own law, nor whether under the circumstances they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is, whether under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship."

The question in *Castrique v. Imrie*, Law Rep. 4 H. L. 414, was as to the effect on the property of a judgment ordering a ship, locally situate in France, to be sold, and therefore was not the same as the question in this case as to what effect is to be given to a judgment against

the person. But at least the decision in *Castrique v. Imrie*, *supra*, establishes this, that a mistake as to English law on the part of a foreign tribunal does not operate in all cases so as to prevent the courts of this country from giving effect to the judgment.

In the course of the arguments in that case the point now under consideration was raised. In the opinion I delivered at the bar of the House, Law Rep. 4 H. L. 434-435, the cases which are commonly referred to as authorities for the opinion expressed by Mr. Smith in his note to *Doe v. Oliver*, 2 Sm. L. C. 2d ed. 448, are referred to. We have nothing to add to what is there said. And in the case of *Novelli v. Rossi*, 2 B. & Ad. 757, it will be found on perusing the judgment of Lord Tenterden that it does not contain one word in support of the doctrine for which it is cited. We think that case was rightly decided for the reasons given in *Castrique v. Imrie*, Law Rep. 4 H. L. 435; but at all events it does not bear out Mr. Smith's position.

For these reasons we have come to the conclusion that judgment should be given for the plaintiffs.

HANNEN, J. I agree that our judgment should be for the plaintiffs in this case, but as I do not entirely concur in the reasoning by which my Brothers BLACKBURN and MELLOR have arrived at that conclusion, I desire shortly to explain the ground on which my judgment is founded.

I think that the authorities oblige us (not sitting in a court of error) to hold that the defendants, by appearing in the suit in France, submitted to the jurisdiction of the French tribunal, and thereby created a *prima facie* duty on their part to obey its decision; but I do not think that any authority binds us, nor am I prepared to decide that a defendant, not guilty of any laches, against whom a foreign judgment *in personam* has been given, is precluded from impeaching it on the ground that it appears on the face of the proceedings to be based on an incorrect view of the English law, even though there may be evidence that the foreign court, knowingly or perversely, refused to recognize that law.

I do not, however, enter at length upon the consideration of this question, because I have arrived at the conclusion that the defendants in this case were guilty of laches. It does not appear upon the face of the proceedings, nor at all, that the French court was informed of what the English law was. It was the duty of the defendants to bring to the knowledge of the French court the provision of the English law on which they now for the first time rely, and having failed to do so, they must submit to the consequences of their own negligence. The French courts, like our own, can only be informed of foreign law by appropriate evidence, and the party who fails to produce it cannot afterwards impeach the judgment obtained against him on account of an error into which the foreign court has fallen presumably in consequence of his own default. Suitors in our own courts, in similar circumstances, must suffer a like penalty for their negligence. A defendant who has omitted to produce evidence which was procurable at the trial of a cause

French judgments; and upon a hearing the bill was dismissed. 42 Fed. Rep. 249. From the decree dismissing the bill an appeal was taken, which was the second case now before this court.

The action at law afterwards came on for trial by a jury. The court directed a verdict for the plaintiffs in the sum of \$277,775.44, being the amount of the French judgment and interest. The defendants, having duly excepted to the rulings and direction of the court, sued out a writ of error.

The writ of error in the action at law and the appeal in the suit in equity were argued together in this court in January, 1894, and by direction of the court were reargued in April, 1894.¹

GRAY, J.² In order to appreciate the weight of the various authorities cited at the bar, it is important to distinguish different kinds of judgments. Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction, proceedings, and notice will be assumed. It will also be assumed that they are untainted by fraud, the effect of which will be considered later.

A judgment *in rem*, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by Chief Justice Marshall: "The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of coördinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coördinate tribunal is capable of making the inquiry." *Williams v. Armroyd*, 7 Cranch, 423, 432. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law. *Croudson v. Leonard*, 4 Cranch, 434; *Williams v. Armroyd*, above cited; *Ludlow v. Dale*, 1 Johns. Cas. 16. But the same rule applies to judgments *in rem* under municipal law. *Hudson v. Guestier*, 4 Cranch, 293; *Ennis v. Smith*, 14 How. 400, 430; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 291; *Scott v. McNeal*, 154 U. S. 34, 46; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Monroe v. Douglas*, 4 Sandf. Ch. 126.

A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. *Cottington's case*,

¹ The statement of facts is abridged, and arguments of counsel are omitted. Part of the opinion of the court is omitted. — ED.

² Part of the opinion is omitted. See the opinion at large for an exhaustive collection of authorities. — ED.

2 Swans. 326; *Roach v. Garvan*, 1 Ves. Sen. 157; *Harvey v. Farnie*, 8 App. Cas. 43; *Cheely v. Clayton*, 110 U. S. 701. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1688, in *Cottington's case*, above cited, said: "It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences."

Other judgments, not strictly *in rem*, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached. *Story on Conflict of Laws* (2d ed.), § 592 *a*. And if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt in a suit by him to recover the amount upon the promise of indemnity. It was of such a judgment, and in such a suit, that Lord Nottingham said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here." *Gold v. Canham* (1689), 2 Swans. 325; s. c. 1 Cas. in Ch. 311. See also *Tarleton v. Tarleton*, 4 M. & S. 20; *Konitzky v. Meyer*, 49 N. Y. 571.

Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country between citizens or residents thereof. *Story's Conflict of Laws*, §§ 330-341; *May v. Breed*, 7 Cush. 15. Such was the case, cited at the bar, of *Burroughs or Burrows v. Jaminean or Jemino*, Mos. 1; s. c. 2 Stra. 733; 2 Eq. Cas. Ab. 525, pl. 7; 12 Vin. Ab. 87, pl. 9; Sel. Cas. in Ch. 69; 1 Dick. 48.

In that case, bills of exchange, drawn in London, were negotiated, indorsed, and accepted at Leghorn in Italy, by the law of which an acceptance became void if the drawer failed without leaving effects in the acceptor's hands. The acceptor, accordingly, having received advices that the drawer had failed before the acceptances, brought a suit at Leghorn against the last indorsees, to be discharged of his acceptances, paid the money into court and obtained a sentence there, by which the acceptances were vacated as against those indorsees and all the indorsers and negotiators of the bills, and the money deposited was returned to him. Being afterwards sued at law in England by subsequent holders of the bills, he applied to the Court of Chancery and obtained a perpetual injunction. Lord Chancellor King, as reported by Strange,

"was clearly of opinion that this cause was to be determined according to the local laws of the place where the bill was negotiated, and the plaintiff's acceptance of the bill having been vacated and declared void by a court of competent jurisdiction, he thought that sentence was conclusive and bound the Court of Chancery here;" as reported in Viner, that "the court at Leghorn had jurisdiction of the thing, and of the persons;" and, as reported by Mosely, that, though "the last indorsees had the sole property of the bills, and were therefore made the only parties to the suit at Leghorn, yet the sentence made the acceptance void against the now defendants and all others." It is doubtful, at the least, whether such a sentence was entitled to the effect given to it by Lord Chancellor King. See *Novelli v. Rossi*, 2 B. & Ad. 757; *Castrique v. Imrie*, L. R. 4 H. L. 414, 435; 2 Smith's Lead. Cas. (2d ed.) 450.

The remark of Lord Hardwicke, *arguendo*, as Chief Justice, in *Boucher v. Lawson* (1734), that "the reason gone upon by Lord Chancellor King, in the case of *Burroughs v. Jamineau*, was certainly right, that where any court, whether foreign or domestic, that has the proper jurisdiction of the case, makes a determination, it is conclusive to all other courts," evidently had reference, as the context shows, to judgments of a court having jurisdiction of the thing; and did not touch the effect of an executory judgment for a debt. Cas. temp. Hardw. 85, 89; s. c. *Cunningham*, 144, 148.

In former times, foreign decrees in admiralty *in personam* were executed, even by imprisonment of the defendant, by the Court of Admiralty in England, upon letters rogatory from the foreign sovereign, without a new suit. Its right to do so was recognized by the Court of King's Bench in 1607 in a case of *habeas corpus*, cited by the plaintiffs, and reported as follows: "If a man of Frizeland sues an Englishman in Frizeland before the Governor there, and there recovers against him a certain sum; upon which the Englishman, not having sufficient to satisfy it, comes into England, upon which the Governor sends his letters massive into England, *omnes magistratus infra regnum Angliæ rogans*, to make execution of the said judgment. The Judge of the Admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law; for this is by the law of nations, that the justice of one nation should be aiding to the justice of another nation, and for one to execute the judgment of the other; and the law of England takes notice of this law, and the Judge of the Admiralty is the proper magistrate for this purpose; for he only hath the execution of the civil law within the realm. Pasch. 5 Jac. B. R., *Weir's* case, resolved upon an *habeas corpus*, and remanded." 1 Rol. Ab. 530, pl. 12; 6 Vin. Ab. 512, pl. 12. But the only question there raised or decided was of the power of the English Court of Admiralty, and not of the conclusiveness of the foreign sentence; and in later times the mode of enforcing a foreign decree in admiralty is by a new libel. See *The City of Mecca*, 5 P. D. 28, and 6 P. D. 106.

The extraterritorial effect of judgments *in personam*, at law or in equity, may differ, according to the parties to the cause. A judgment of that kind between two citizens or residents of the country, and thereby subject to the jurisdiction, in which it is rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound. *Ricardo v. Garcias*, 12 Cl. & Fin. 368; *The Griefswald*, Swabey, 430, 435; *Barber v. Lamb*, 8 C. B. (N. S.) 95; *Lea v. Deakin*, 11 Biss. 23.

The effect to which a judgment, purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country — as is the case now before us — presents a more difficult question, upon which there has been some diversity of opinion.

Early in the last century, it was settled in England that a foreign judgment on a debt was considered not, like a judgment of a domestic court of record, as a record or a specialty, a lawful consideration for which was conclusively presumed; but as a simple contract only. . . .

In recent times, foreign judgments rendered within the dominions of the English Crown, and under the law of England, after a trial on the merits, and no want of jurisdiction, and no fraud or mistake, being shown or offered to be shown, have been treated as conclusive by the highest courts of New York, Maine, and Illinois. *Lazier v. Wescott* (1862), 26 N. Y. 146, 150; *Dunstan v. Higgins* (1893), 138 N. Y. 70, 74; *Rankin v. Goddard* (1866), 54 Me. 28, and (1868) 55 Me. 389; *Baker v. Palmer* (1876), 83 Ill. 568. In two early cases in Ohio, it was said that foreign judgments were conclusive, unless shown to have been obtained by fraud. *Silver Lake Bank v. Harding* (1832), 5 Ohio, 545, 547; *Anderson v. Anderson* (1837), 8 Ohio, 108, 110. But in a later case in that State it was said that they were only *prima facie* evidence of indebtedness. *Pelton v. Platner* (1844), 13 Ohio, 209, 217. In *Jones v. Jamison* (1860), 15 La. Ann. 35, the decision was only that, by virtue of the statutes of Louisiana, a foreign judgment merged the original cause of action as against the plaintiff. . . .

In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or

any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

But they have sought to impeach that judgment upon several other grounds, which require separate consideration.

It is objected that the appearance and litigation of the defendants in the French tribunals were not voluntary, but by legal compulsion, and therefore that the French courts never acquired such jurisdiction over the defendants, that they should be held bound by the judgment.

Upon the question what should be considered such a voluntary appearance, as to amount to a submission to the jurisdiction of a foreign court, there has been some difference of opinion in England. . . .

But it is now settled in England that, while an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance. *De Cosse Brissac v. Rathbone* (1860), 6 H. & N. 301; s. c. 20 Law Journal (N. S.), Exch. 238; *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 162; *Voinet v. Barrett* (1885), 1 Cab. & El. 554; s. c. 54 Law Journal (N. S.), Q. B. 521, and 55 Law Journal (N. S.), Q. B. 39.

The present case is not one of a person travelling through or casually found in a foreign country. The defendants, although they were not citizens or residents of France, but were citizens and residents of the State of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France. Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property, in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of those courts, from being taken in satisfaction of any judgment that might be recovered against them, would not, according to our law, show that those courts did not acquire jurisdiction of the persons of the defendants. . . .

It is now established in England by well considered and strongly reasoned decisions of the Court of Appeal, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.¹ . . .

¹ Citing *Abouloff v. Oppenheimer*, 10 Q. B. D. 295; *Vadala v. Lawes*, 25 Q. B. D. 310; *Crozat v. Brogden*, [1894] 2 Q. B. 30. — Ed.

But whether these decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries. . . .

There is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller States, — Norway, Portugal, Greece, Monaco, and Hayti, — the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being *prima facie* evidence of the justice of the claim. In the great majority of the countries on the continent of Europe, — in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary (perhaps in Italy), and in Spain, — as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

The prediction of Mr. Justice Story (in section 618 of his Commentaries on the Conflict of Laws, already cited) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as *prima facie* evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made,

it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the Colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to re-examination, either merely because it was a foreign judgment, or because judgments of that nation would be re-examinable in the courts of France.

For these reasons, in the action at law, the

Judgment is reversed, and the cause remanded to the Circuit Court with directions to set aside the verdict and to order a new trial.

For the same reasons, in the suit in equity between these parties, the foreign judgment is not a bar, and, therefore, the

Decree dismissing the bill is reversed, the plea adjudged bad, and the cause remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

Mr. Chief Justice FULLER, with whom concurred Mr. Justice HARLAN, Mr. Justice BREWER, and Mr. Justice JACKSON, dissenting.

Plaintiffs brought their action on a judgment recovered by them against the defendants in the courts of France, which courts had jurisdiction over person and subject-matter, and in respect of which judgment no fraud was alleged, except in particulars contested in and considered by the French courts. The question is whether under these circumstances, and in the absence of a treaty or act of Congress, the judgment is re-examinable upon the merits. This question I regard as one to be determined by the ordinary and settled rule in respect of allowing a party, who has had an opportunity to prove his case in a competent court, to retry it on the merits, and it seems to me that the doctrine of *res judicata* applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation.

This application of the doctrine is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law. The fundamental principle concerning judgments is that disputes are finally determined by them, and I am unable to perceive why a judgment *in personam* which is not open to question on the ground of want of jurisdiction, either intrin-

sically or over the parties, or of fraud, or on any other recognized ground of impeachment, should not be held *inter partes*, though recovered abroad, conclusive on the merits.

Judgments are executory while unpaid, but in this country execution is not given upon a foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose.

The principle that requires litigation to be treated as terminated by final judgment properly rendered, is as applicable to a judgment proceeded on in such an action, as to any other, and forbids the allowance to the judgment debtor of a retrial of the original cause of action, as of right, in disregard of the obligation to pay arising on the judgment and of the rights acquired by the judgment creditor thereby.

That any other conclusion is inadmissible is forcibly illustrated by the case in hand. Plaintiffs in error were trading copartners in Paris as well as in New York, and had a place of business in Paris at the time of these transactions and of the commencement of the suit against them in France. The subjects of the suit were commercial transactions, having their origin, and partly performed, in France under a contract there made, and alleged to be modified by the dealings of the parties there; and one of the claims against them was for goods sold to them there. They appeared generally in the case, without protest, and by counterclaims relating to the same general course of business, a part of them only connected with the claims against them, became actors in the suit and submitted to the courts their own claims for affirmative relief, as well as the claims against them. The courts were competent, and they took the chances of a decision in their favor. As traders in France they were under the protection of its laws and were bound by its laws, its commercial usages, and its rules of procedure. The fact that they were Americans and the opposite parties were citizens of France is immaterial, and there is no suggestion on the record that those courts proceeded on any other ground than that all litigants, whatever their nationality, were entitled to equal justice therein. If plaintiffs in error had succeeded in their cross suit and recovered judgment against defendants in error, and had sued them here on that judgment, defendants in error would not have been permitted to say that the judgment in France was not conclusive against them. As it was, defendants in error recovered, and I think plaintiffs in error are not entitled to try their fortune anew before the courts of this country on the same matters voluntarily submitted by them to the decision of the foreign tribunal. We are dealing with the judgment of a court of a civilized country, whose laws and system of justice recognize the general rules in respect to property and rights between man and man prevailing among all civilized peoples. Obviously the last persons who should be heard to complain are those who identified themselves with the business of that country, knowing that all their transactions there would be subject to the local laws and modes of doing business. The French courts appear to have acted "judicially, honestly, and

with the intention to arrive at the right conclusion ;" and a result thus reached ought not to be disturbed.

[The learned Chief Justice here recited extracts from the opinions in *Nouvion v. Freeman*, 15 App. Cas. 1, and *Godard v. Gray*, L. R. 6 Q. B. 189, and continued:]

In any aspect, it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now the rule is universal in this country that private rights acquired under the laws of foreign States will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the State where this is sought to be done ; and although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails to-day by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right.

And, without going into the refinements of the publicists on the subject, it appears to me that that law finds authoritative expression in the judgments of courts of competent jurisdiction over parties and subject-matter.

It is held by the majority of the court that defendants cannot be permitted to contest the validity and effect of this judgment on the general ground that it was erroneous in law or in fact ; and the special grounds relied on are *seriatim* rejected. In respect of the last of these, that of fraud, it is said that it is unnecessary in this case to decide whether certain decisions cited in regard to impeaching foreign judgments for fraud could be followed consistently with our own decisions as to impeaching domestic judgments for that reason, "because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France, and that ground is the want of reciprocity on the part of France as to the effect to be given to the judgments of this and other foreign countries." And the conclusion is announced to be "that judgments rendered in France or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim." In other words, that although no special ground exists for impeaching the original justice of a judgment, such as want of jurisdiction or fraud, the right to retry the merits of the original cause at large, defendant being put upon proving those merits, should be accorded in every suit on judgments recovered in countries where our own judgments are not given full effect, on that ground merely.

I cannot yield my assent to the proposition that because by legislation and judicial decision in France that effect is not there given to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered,

(subject, of course, to the recognized exceptions,) therefore we should pursue the same line of conduct as respects the judgments of French tribunals. The application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary.

As the court expressly abstains from deciding whether the judgment is impeachable on the ground of fraud, I refrain from any observations on that branch of the case.

Mr. Justice HARLAN, Mr. Justice BREWER, and Mr. Justice JACKSON concur in this dissent.

SADLER v. ROBINS.

NISI PRIUS, AND COURT OF KING'S BENCH. 1808.

[Reported 1 Campbell, 253.]

ASSUMPSIT on a decree of the high Court of Chancery in the island of Jamaica. The declaration stated, that on the 16th day of July, 1805, in a certain cause, wherein James Sadler and others were complainants, and James Robins and others, executors of John Sadler deceased, were defendants, it was by the said high Court of Chancery ordered, adjudged, and decreed, that the said James Robins and one R. Haywood, since deceased, should on or before the first day of January then next ensuing pay unto the said James Sadler, or his lawful attorney or attornies in the said island, the sum of £3,670 1s. 9½d. current money of the said Island, with interest thereon from the 31st day of December then last past, first deducting thereout the full costs of the said defendants expended in the said suit, the same to be taxed by George Howell, Esq., one of the masters of the said court; and also deducting thereout all and every further payment or payments which the said James Sadler and R. Haywood or either of them might, on or before the said 1st day of January, 1806, show to the satisfaction of the said George Howell that they or either of them had paid on account of their said testator's estate. The declaration having then stated a liability and promise in the words of the decree, and the amount of the sum to be paid in sterling money with interest, went on to aver that the said James Robins and R. Haywood did not nor did either of them on or before the 1st day of January, 1806, or at any subsequent time, cause the costs by the said defendants in the said cause in the said Court of Chancery expended in that suit to be taxed by the said George Howell, Esq., or by any other of the masters of the said Court of Chancery, but as well the said James Robins, and R. Haywood, in the lifetime of the said R. Haywood, as the said James Robins since the death of the said R. Haywood, have altogether neglected and refused

so to do, nor did the said James Robins, and R. Haywood, in the lifetime of the said R. Haywood, on or before the said first day of January, 1806, show to the satisfaction of the said George Howell, or any other master of the said court, that they or either of them had paid on account of the said testator's estate any sum or sums of money whatsoever: Breach, for non-payment of the said sum of £3,670 1s. 9½d. current money, with interest due thereon, as mentioned in the decree. Plea, *the general issue*.

The Attorney General having opened the plaintiff's case,

Lord ELLENBOROUGH expressed himself of opinion that the action was not maintainable; as it did not appear what sum was actually due to the plaintiff according to the terms of the decree.

The Attorney General contended that it lay upon the defendant to reduce the sum below that awarded to be paid on the first of January, 1806, and that if he took no steps for this purpose, the whole sum of £3,670 1s. 9½d. currency, became absolutely due on that day. It was impossible for the plaintiff either to tax the costs of the defendants in the suit, or to show what sums of money any of them has paid for their testator; and it was plain, from the words of the decree, that before any deduction was to be made by the plaintiff, the acts of taxing costs and proving payments were to be done by the opposite party.

Lord ELLENBOROUGH. "Deducting thereout the full costs of the said defendants" is the same as "the full costs of the said defendants first being deducted thereout;" and if the defendants did not appear to tax their costs, the plaintiff might have proceeded *ex parte*. At present, the sum due on the decree is quite indefinite. The operations to ascertain it should have taken place in the Court of Chancery in Jamaica, and cannot be gone through here at *nisi prius*. Had the decree been perfected, I would have given effect to it, as well as to a judgment at common law. The one may be the consideration for an assumpsit equally with the other.¹ But the law implies a promise to pay a definite, not an indefinite sum.

The Attorney General then urged strenuously, that the objection was upon the record, and that if it was well founded, judgment might be arrested.

Lord ELLENBOROUGH. If there is evidently no consideration to raise a promise, so that the action cannot be supported, why should the defendant be put to move in arrest of judgment? The plaintiff ought not to have brought his action here, while the decree was in an incomplete state. The case we had at the sittings after last term, *Buchanan v. Rucker*, 1 Camp. 63, shows with what facility these decrees and judgments in the West India islands are obtained; and they ought to be examined with some strictness before they are put in force in this country. In many other cases, when it is clear the action will not lie; although the objection appears on the record, and might be taken

¹ *Acc. Henderson v. Henderson*, 6 Q. B. 288; *Pennington v. Gibson*, 16 How. 65; *Meyer v. Brooks*, 29 Or. 203. — Ed.

advantage of by motion in arrest of judgment, or by writ of error, judges are in the habit of directing a nonsuit.

The plaintiff was then called.

The Attorney General in the following term obtained a rule to show cause why this nonsuit should not be set aside; but cause being shown, the judges were unanimously of opinion that it ought to stand.

LORD ELLENBOROUGH. There appears to be due to the plaintiff upon the decree a sum of money — *z.* Till the sum to be deducted is ascertained, it is impossible to say how much is really due. The plaintiff ought to have taxed the costs *ex parte*. There is no court where this proceeding is not allowed. At present no one can predicate how much the defendant is decreed to pay. The decree is therefore imperfect and cannot be the foundation of an assumpsit. As to the payments on account of the testator's estate, none being proved, it might be presumed that there were none; but there had certainly been costs expended in the suit, and until they are deducted according to the terms of the decree, an action cannot be maintained upon it.

GROSE, J. The plaintiff shows what sum is not due to him, not what sum is due.

LE BLANC, J. It is clear that the plaintiff is not entitled to the whole sum mentioned in the decree; and it was competent to him to have had the costs taxed at something however small.

BAYLEY, J. Of the same opinion.

*Rule discharged.*¹

CHRISTMAS v. RUSSELL.

SUPREME COURT OF THE UNITED STATES. 1867.

[Reported 5 Wallace, 290.]

CLIFFORD, J. Wilson, on the eleventh day of November, 1857, recovered judgment in one of the county courts in the State of Kentucky, against the plaintiff in error, for the sum of five thousand six hundred and thirty-four dollars and thirteen cents, which, on the thirty-first day of March, 1859, was affirmed in the Court of Appeals. Present record shows that the action in that case was assumpsit, and that it was founded upon a certain promissory note, signed by the defendant in that suit, and dated at Vicksburg, in the State of Mississippi, on the tenth day of March, 1840, and that it was payable at the Merchants' Bank, in New Orleans, and was duly indorsed to the plaintiff by the payee. Process was duly served upon the defendant, and he appeared in the case and pleaded to the declaration. Several defences were set up, but they were all finally overruled, and the verdict and judgment were for the plaintiff.

¹ *Acc.* Whitaker v. Bramson, 2 Paine, 209. So of an alternative judgment for a return or the payment of money. Thorner v. Batory, 41 Md. 593. — Ed.

On the fourth day of June, 1854, the prevailing party in that suit instituted the present suit in the court below, which was an action of debt on that judgment, as appears by the transcript. Defendant was duly served with process, and appeared and filed six pleas in answer to the action. Reference, however, need only be particularly made to the second and fourth, as they embody the material questions presented for decision. Substance and effect of the second plea were that the note, at the commencement of the suit in Kentucky, was barred by the statute of limitations of Mississippi, the defendant having been a domiciled citizen of that State when the cause of action accrued, and from that time to the commencement of the suit.

Fourth plea alleges that the judgment mentioned in the declaration was procured by the fraud of the plaintiff in that suit. Plaintiff demurred to these pleas, as well as to the fifth and sixth, and the court sustained the demurrers.¹ . . .

4. Cases may be found in which it is held that the judgment of a State court, when introduced as evidence in the tribunals of another State, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another State are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not foreign judgments under the Constitution and laws of Congress in any proper sense, because they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the State from whence" they were taken, nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the State where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments. *D'Arcy v. Ketchum et al.*, 11 How. 165; *Webster v. Reid*, 11 How. 437.

Subject to those qualifications, the judgment of a State court is conclusive in the courts of all the other States wherever the same matter is brought in controversy. Established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment. *Voorhees v. United States Bank*, 10 Pet. 449; *Huff v. Hutchinson*, 14 How. 588.

5. Exactly the same point was decided in the case of *Benton v. Burgot* (10 Sergeant & Rawle, 240) which, in all respects, was substantially like the present case. The action was debt on judgment

¹ Only so much of the opinion as discusses the demurrer to the fourth plea is given.
— Ed.

recovered in a court of another State, and the defendant appeared and pleaded *nil debet*, and that the judgment was obtained by fraud, imposition, and mistake, and without consideration. Plaintiff demurred to those pleas, and the court of original jurisdiction gave judgment for the defendant. Whereupon the plaintiff brought error, and the Supreme Court of the State, after full argument, reversed the judgment and directed judgment for the plaintiff. Domestic judgments, say the Supreme Court of Maine, even if fraudulently obtained, must nevertheless be considered as conclusive until reversed or set aside. *Granger v. Clark*, 22 Me. 180. Settled rule, also, in the Supreme Court of Ohio, is that the judgment of another State, rendered in a case in which the court had jurisdiction, has all the force in that State of a domestic judgment, and that the plea of fraud is not available as an answer to an action on the judgment. Express decision of the court is, that such a judgment can only be impeached by a direct proceeding in chancery. *Anderson v. Anderson*, 8 Ohio, 108.

Similar decisions have been made in the Supreme Court of Massachusetts, and it is there held that a party to a judgment cannot be permitted in equity, any more than at law, collaterally to impeach it on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered. *B. & W. Railroad v. Sparhawk*, 1 Allen, 448; *Homer v. Fish*, 1 Pick. 435. Whole current of decisions upon the subject in that State seems to recognize the principle that when a cause of action has been instituted in a proper forum, where all matters of defence were open to the party sued, the judgment is conclusive until reversed by a superior court having jurisdiction of the cause, or until the same is set aside by a direct proceeding in chancery. *McRae v. Mattoon*, 13 Pick. 57. State judgments, in courts of competent jurisdiction, are also held by the Supreme Court of Vermont to be conclusive as between the parties until the same are reversed or in some manner set aside and annulled. Strangers, say the court, may show that they were collusive or fraudulent; but they bind parties and privies. *Atkinsons v. Allen*, 12 Vt. 624.

Redfield, Ch. J., said in the case of *Hammond v. Wilder*, 23 Vt. 346, that there was no case in which the judgment of a court of record of general jurisdiction had been held void, unless for a defect of jurisdiction. Less uniformity exists in the reported decisions upon the subject in the courts of New York, but all those of recent date are to the same effect. Take, for example, the case of *Embury v. Conner*, 3 Coms. 522, and it is clear that the same doctrine is acknowledged and enforced. Indeed the court, in effect, say that the rule is undeniable that the judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. *Dobson v. Pearce*, 2 Kern. 165. Same rule prevails in the courts of New Hampshire,

Rhode Island, and Connecticut, and in most of the other States. *Hol-
lister v. Abbott*, 11 Fost. 448; *Rathbone v. Terry*, 1 R. I. 77; *Topp
v. The Bank*, 2 Swan, 188; *Wall v. Wall*, 28 Miss. 413.

For these reasons our conclusion is, that the fourth plea of the de-
fendant is bad upon general demurrer, and that there is no error in
the record. The judgment of the Circuit Court is therefore,

Affirmed with costs.

BULLOCK v. BULLOCK.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1894.

[*Reported 52 New Jersey Equity, 561.*]

MAGIE, J.¹ The appellant in this cause was the complainant below. Her bill of complaint stated the following facts, viz., that she had commenced an action in the Supreme Court of the State of New York, which court had "jurisdiction in the case," against respondent, her former husband, for the purpose of dissolving the marriage previously entered into by them; that respondent was personally served with process and duly appeared in said action; that such proceedings were had thereon that a judgment was rendered in her favor, whereby it was adjudged that said marriage should be dissolved; that respondent should pay to her, as alimony, \$100 on the first day of each month, commencing June 1, 1892, and should execute a mortgage as security for such payments, upon lands in the State of New Jersey, of such form and containing such provisions as the court should subsequently direct and approve; that said court, by a subsequent order, directed respondent to execute, acknowledge, and deliver to appellant a mortgage of a specified form and containing specified provisions, upon lands in this

¹ Part of this opinion and part of the dissenting opinion, in which is discussed the jurisdiction of the New York court, are omitted. — Ed.

State which were particularly described in the order; that respondent had failed and refused to execute and deliver the mortgage as directed, and made various mortgages and conveyances of said lands without consideration and with the fraudulent purpose of defeating appellant's rights.

It was charged in the bill that appellant, by virtue of the decree and order of the New York court, acquired an equitable lien on said lands prior to the lien and interest of the mortgagees and grantees of respondent, and an equitable right to a mortgage on said lands in accordance with the decree and order.

Upon these statements and charges the prayers of the bill were for answer and discovery, for a decree setting aside the mortgages and conveyances of respondent, and that he be "decree'd, pursuant to the said decree and order of the New York Supreme Court, to execute and deliver" to her "the mortgage on said premises therein directed to be made and delivered, according to the form therein provided." There was a general prayer for relief.

Respondent moved the Court of Chancery to dismiss the bill pursuant to the practice established by rule 215 of that court, upon the ground that the bill exhibited no equity entitling appellant to the relief she prayed for. The notice of the motion specifically set forth the grounds of objection.

The motion was heard by Vice-Chancellor Bird, and upon his advice a decree was made dismissing the bill. The opinion of the vice-chancellor is reported in 6 Dick. Ch. Rep. 444. From this decree appellant has prosecuted the appeal which is now to be decided. . . .

In my judgment it does not admit of doubt that the jurisdiction of the Supreme Court of New York, if properly averred in the bill, was a jurisdiction to make a decree as to alimony and its being secured by mortgage on lands in New Jersey only *in personam*, and to enforce it by any process against respondent which is proper in that State. Nor was the decree which was pronounced by that court capable of any other construction than one which shows it to have been within such conceded jurisdiction.

From these considerations I deem it evident that the theory of this bill that, by virtue of the decree and order of the Supreme Court of New York, appellant acquired an equitable lien on lands in New Jersey and a right to have such lands disposed in a certain manner, cannot be sustained without a disastrous violation of fundamental principles. The decree and order of that court does not pretend to have any such purpose or effect, nor could that court be empowered to make a decree having such an effect.

But it is ingeniously contended in this court that the decree and order of the Supreme Court of New York imposed upon respondent a personal obligation to do what that decree and order had directed him to do, and that a court of equity in New Jersey ought to compel him to perform that obligation as it would compel him to perform his con-

tract to convey or mortgage lands in its jurisdiction. Moreover, it is contended that the provisions of section 1 of article 4 of the Constitution of the United States, requiring full faith and credit to be given in each State to the records and judicial proceedings of every other State impart to this decree and order a conclusive force with respect to the mortgage directed to be given on lands here, which compels our courts to enforce it by degrees in conformity therewith.

Doubtless the judgment of the New York court must be accorded in our courts a conclusive effect in certain respects. Thus it has conclusively determined the status of the parties to that action, and that the marital relation previously existing between them has been absolutely dissolved. If, by the direction to pay alimony an indebtedness arises from time to time as such payments become due, an action at law would lie thereon, and the decree would furnish conclusive evidence of such indebtedness.

But the question, upon the solution of which this case must turn, is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answered in the affirmative, it seems evident that we accord jurisdiction over lands in New Jersey to the courts of other States, and, as was said by Chancellor Zabriskie, in *Davis v. Headley*, 22 N. J. Eq. 115, "leave to the courts of this State only the ministerial duty of executing their decrees." For the doctrine that jurisdiction respecting lands in a foreign State is not *in rem* but only *in personam* is heretofore of all practical force if the decree *in personam* is conclusive and must be enforced by the courts of the situs.

If such is the effect which must be given to the judgments and decrees of the courts of a sister State respecting lands situated here, it is extraordinary that no trace of the doctrine can be found in text-books or in adjudicated decisions. My researches have not disclosed any support of the doctrine by any text-writer of repute or by any decision in point. The very industrious counsel who maintained this view in argument has produced no authority which, in my judgment, sustains his position. . . .

The contention that such an order requiring lands in New Jersey to be charged with alimony created a personal obligation on respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process or to make our decrees operate as process. Moreover, the substantial part of the decree is comprised in the dissolution of the marriage and the direction to pay alimony. The charge of the alimony upon lands is rather in the nature of process to enforce the substantial decretal order for alimony.

The establishment of the contrary doctrine would result in practically depriving a State of that exclusive control over immovable property therein which has always been accorded. For example, by our statutes, contracts respecting lands, to be enforceable, must be entered into and evidenced in a particular mode, but our courts, upon equitable grounds, sometimes enforce contracts that are without the statute. It is the province of our legislature to prescribe the rule for such contracts and for our courts to construe the rule so prescribed and to determine when such contracts, whether within or without the statute, may be enforced. It is true that the courts of another State, proceeding *in personam* to enforce a contract for lands in New Jersey, would be bound to determine whether the contract was enforceable under our laws. But they would construe those laws, and if their decree *in personam* may and must be conclusive in our courts and compel a decree in conformity therewith, it is obvious that the contract will be enforced according to whatever construction the foreign court put upon our laws, and not according to the construction of our own courts. Other examples will occur to any one considering the subject.

For these reasons I shall vote to affirm the decree below.

GARRISON, J. (concurring).

I concur in the result announced by Mr. Justice MAJES, but not for the reasons contained in the opinion just read, nor for those stated in the conclusions of the learned equity judge who heard the cause in the Court of Chancery.

The object of the complainant's bill is to execute, through the medium of our Court of Chancery, an order made by the Supreme Court of New York upon the defendant to secure his performance of a decree rendered therein against him by mortgaging his lands in New Jersey. The procedure in this State is justified under that provision of the federal law that gives conclusive force in one State to the records and judicial proceedings of another. The vice of this deduction, in the case before us, is that it assumes that the order made by the New York court to secure the performance by the defendant of its decree against him is a "*judgment*" of that State within the meaning of the federal Constitution and the act of Congress.

The transcendent force given by the federal law to the judicial proceedings of sister States is confined to such judicial determinations as possess the quality of *judgment*; it does not extend to proceedings in the nature of execution or to orders merely ancillary to some special form of relief.

In cases that proceed to judgment in common-law form, this distinction is well marked, but it is liable to be lost sight of in decisions rendered in equity causes where judgment, in decretal form, is often accompanied by special orders for particular forms of relief or for the enforcement or securing of the execution of the decree pronounced. The distinction, however, is always a substantial one that

must not be overlooked because of the form in which the decretal order may be framed.

That only is *judgment* that is pronounced between the parties to the action upon the matters submitted to the court for decision. To judgments thus rendered, the federal law accords in every State the same conclusive force possessed in the State where they are rendered. After judgment in a State court, all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution or in aid of execution. No interpretation has ever been placed upon the federal Constitution giving conclusive effect, or, indeed, any effect at all to the executions of the judgments rendered in sister States or to any order merely in aid thereof. Such orders lack the quality of *judgment* and must be differentiated from judgments, even though embodied in the same decretal orders that pronounce the judgment of the court. These decretal orders may be defined to be decisions made touching some matter collateral to the issue presented in the record or required to be passed upon in order to carry into execution the judgment of the court. To these determinations ancillary to execution, no extraterritorial force is given by the federal law.

That the order in the present case touching the defendant's land in New Jersey is of this nature clearly appears in the case before us. Upon this demurrer it is established that the New York suit was instituted for the sole purpose of dissolving the marriage of the complainant with the defendant. Upon the record thus submitted the Supreme Court of New York pronounced as its judgment that the marriage should be dissolved with the incident of alimony to the complainant. Here the sentence of the law upon the record ceases. The order of the court then proceeds in these words: "And it is further adjudged and decreed that the said defendant, within ten days after the entry of this judgment and service thereof on the attorney for the defendant, execute and deliver unto the plaintiff a mortgage covering the real property owned by the defendant and particularly located in the State of New Jersey, which mortgage shall be of such form and contain such provisions as shall be sufficient and requisite to secure unto the plaintiff the faithful performance of the provisions of this judgment and decree on the part of the defendant as may be directed and approved by this court."

In my opinion this order was ancillary to execution and did not possess any element of a judgment upon the issue submitted to the court for decision, which was whether the marriage between the parties should be dissolved. For this reason I think the complainant's bill was properly dismissed.

VAN SYCKEL, J. (dissenting).

The Supreme Court of New York made a decree for divorce in favor of the wife, and ordered that the husband pay \$100 per month alimony, and that to secure it to the wife he should execute a mortgage on lands

which he owned in New Jersey. Personal service was made upon the husband in the New York divorce suit, and the decree for divorce, including the order to execute the mortgage, was obtained on the 1st day of July, 1892.

On the 19th of November, 1892, on the application of the wife's attorney, an order was entered in the New York court specifying the lands in New Jersey upon which the husband should execute the mortgage.

Thereupon the wife filed a bill in the Court of Chancery of this State to compel the husband to execute the mortgage in accordance with the New York judgment, and also to set aside conveyances of the property in this State by the husband, which are alleged to be fraudulent. . . .

It is undoubtedly true that the New York court had no power to create a lien upon New Jersey lands, and it is also true that the New York court could have acted upon the person of the husband while within its jurisdiction and constrained him to execute such a writing as would have been effective to pass the title to, or establish a lien on, the New Jersey lands. The question, however, is not what the New York court could have done, but what the courts of New Jersey, in discharge of her constitutional obligations, should do in aid of the wife after rendition of the judgment in New York.

The New York court having jurisdiction of the person of the husband and also of the subject-matter of the suit there, the judgment in that State, as between the parties to that suit, was conclusive of the right of the wife to have the husband execute a mortgage upon the New Jersey lands, although it did not of its own force create a lien upon the lands. As to the title to such lands, it had the effect of an admitted legal contract or obligation by the husband to convey and should be enforced in equity here.

A judgment in New York that a party defendant shall specifically perform a written contract to convey lands in New Jersey would furnish no better foundation for the interference of our court of equity than the judgment relied upon in this case. In what respect they differ in principle is not apparent. In either case obedience to the mandate of the federal Constitution would give effect to the judgment here.

In *Elizabeth Savings Institution v. Gerber*, 8 Stew. Eq. 153, this court held that a judicial order in New York that the garnishee owes a debt to the defendant in a judgment, such moneys being in the custody of a court of equity, creates *per se* a right to apply to such court for such moneys in the same way as an assignment of such moneys to the plaintiff in the judgment would have passed such right. Such a decree in the New York court settled the plaintiff's right to the fund, and that right was an equitable one, which was enforced in this State.

The decree or judgment in New York has the effect of being not merely *prima facie* evidence, but conclusive proof of the rights thereby

adjudicated, and a refusal to give it the force and effect in this respect which it had in the State in which it was rendered denies a right secured by fundamental law.

The force and effect of the decree for alimony in New York was not to create a lien upon lands in New Jersey, but to conclusively entitle the wife to have that decree enforced against the husband.

It being competent for our courts to enforce such a decree made in our own courts by establishing it as a lien on lands, we cannot refuse like relief in this case on the extraterritorial judgment. *Huntington v. Attrill*, 146 U. S. 657; *McElmoyle v. Cohen*, 13 Pet. 312.

In *Cheever v. Wilson*, 9 Wall. 108, 121, there was an order of the divorce court in Indiana directing the wife to pay one-third of her rents as they became due to her husband. The land was in Washington, where suit was brought to enforce payment of the rents to the husband. The court said that the decree in Indiana, so far as it related to the real property in question, could have no extraterritorial effect; but if valid, it bound these who were parties in the case, and could have been enforced in the *situs rei* by proper proceedings for that purpose.

The judgment in New York must be regarded as conclusively imposing a legal personal obligation or duty upon the husband to mortgage his lands in New Jersey.

The New York judgment is conclusive between the parties to it—

First. As to the right to a divorce.

Second. As to the right of the wife to the alimony allowed.

Third. It is equally conclusive, as against the husband, as to her right to have such alimony secured by a mortgage on his New Jersey lands, that being expressly a part of the adjudication in New York.

The judgment imposed an obligation upon the husband from which he cannot relieve himself by removing from the jurisdiction in which it was rendered; that obligation follows him into this State.

The lien does not by mere force of the extraterritorial judgment attach to lands in this State. To impress that lien upon lands here the intervention of our court of equity is necessary, just as it is necessary to sue here upon a New York judgment before execution can issue from our courts to obtain satisfaction of it.

The husband has had his day in court in New York, where all these questions have been adjudicated against him, and our courts should hold that he is thereby concluded.

The question in its true form is whether we will give full faith and credit to the judgment of the New York court in so far as it finally adjudges the questions legally submitted to it, when it had jurisdiction both of the subject-matter of the controversy and of the parties to it.

It seems to me that there can be but one answer to this question, and that the court below erred in dismissing the complainant's bill.¹

¹ Execution will not be issued on the judgment of another State of the Union without suit upon the judgment. *McElmoyle v. Cohen*, 13 Pet. 312; *Turley v. Dreyfus*, 85 La. Ann. 510; *Lamberton v. Grant*, 94 Mo. 508, 48 Atl. 127. — Ed.

SECTION III.

THE JUDGMENT AS RES JUDICATA.

CROUDSON v. LEONARD.

SUPREME COURT OF THE UNITED STATES. 1808.

[*Reported 4 Cranch, 434.*]

JOHNSON, J. The action below was instituted on a policy of insurance.

On behalf of the insurers, it was contended that the policy was forfeited by committing a breach of blockade. It is not, and cannot be made a question, that this is one of those acts which will exonerate the underwriters from their liability. The only point below was relative to the evidence upon which the commission of the act may be substantiated. A sentence of a British prize court in Barbadoes was given in evidence, by which it appeared that the vessel was condemned for attempting to commit a breach of blockade. It is the English doctrine and the correct doctrine on the law of nations, that an attempt to commit a breach of blockade is a violation of belligerent rights, and authorizes capture. This doctrine is not denied, but the plaintiff contends that he did not commit such an attempt, and the court below permitted evidence to go to the jury to disprove the fact on which the condemnation professes to proceed.

On this point, I am of opinion that the court below erred.

I do not think it necessary to go through the mass of learning on this subject, which has so often been brought to the notice of this court, and particularly in the case of *Fitzsimmons*, argued at this term. Nearly the whole of it will be found very well summed up in the 18th chapter of Mr. Park's Treatise. The doctrine appears to me to rest upon three very obvious considerations: the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction — the very great inconvenience amounting nearly to an impossibility of fully investigating such cases in a court of common law — and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world.

It is sometimes contended that this doctrine is novel, and that it takes its origin in an incorrect extension of the principle in *Hughes v. Cornelius*. I am induced to believe that it is coeval with the species of contract to which it is applied. Policies of insurance are known to have been brought into England from a country that acknowledged the civil law. This must have been the law of policies at the time when

they were considered as contracts proper for the admiralty jurisdiction, and were submitted to the court of policies established in the reign of Elizabeth. It is probable that, at the time when the common law assumed to itself exclusive jurisdiction of the contract of insurance, the rule was too much blended with the law of policies to have been dispensed with, had it even been inconsistent with common law principles. But, in fact, the common law had sufficient precedent for this rule, in its own received principles relative to sentences of the civil law courts of England. It may be true that there are no cases upon this subject prior to that of *Hughes v. Cornelius*, but this does not disprove the existence of the doctrine. There can be little necessity for reporting decisions upon questions that cannot be controverted. Since the case of *Hughes v. Cornelius*, the doctrine has frequently been brought to the notice of the courts of Great Britain in insurance cases, but always with a view to contest its applicability to particular cases, or to restrict the general doctrine by exceptions, but the existence of the rule or its applicability to actions on policies is nowhere controverted.

I am of opinion that the sentence of condemnation was conclusive evidence of the commission of the offence for which the vessel was condemned, and as that offence was one which vitiated the policy, the defendants ought to have had a verdict.

WASHINGTON, J. The single question in this case is, whether the sentence of the admiralty court at Barbadoes, condemning the brig "Fame" and her cargo as prize, for an attempt to break the blockade of Martinique, is conclusive evidence against the insured, to falsify his warranty of neutrality, notwithstanding the fact stated in the sentence as the ground of condemnation is negatived by the jury?

This question has long been at rest in England. The established law upon this subject in the courts of that country is, that the sentence of a foreign court of competent jurisdiction condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided, that it can never be controverted, directly or collaterally, in any other court having concurrent jurisdiction.

This doctrine seems to result from the application of a legal principle which prevails in respect to domestic judgments, to the judgments and sentences of foreign courts.

It is a well established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose. It is not only conclusive of the right which it establishes, but of the fact which it directly decides.

This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem*, but any person having an

interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that, in this respect, he also represents the insurer. That irregularities have sometimes taken place, to the exclusion of a fair hearing of the parties, is not to be denied. But this furnishes no good reason against the adoption of a general rule. A spirit of comity has induced the courts of England to presume that foreign tribunals, whether of prize or municipal jurisdiction, will act fairly, and will decide according to the laws which ought to govern them; and public convenience seems to require that a question which has once been fairly decided should not again be litigated between the same parties, unless in a court of appellate jurisdiction.

The irregular and unjust decisions of the French courts of admiralty of late years have induced even English judges to doubt of the wisdom of the above doctrine in relation to foreign sentences, but which they have acknowledged to be too well established for English tribunals to shake; and the justice with which the same charge is made by all neutral nations against the English as well as against the French courts of admiralty, during the same period, has led many American jurists to question the validity of the doctrine in the courts of our own country. It is said to be a novel doctrine, lately sprung up, and acted upon as a rule of decision in the English courts, since the period when English decisions have lost the weight of authority in the courts of the United States. It is this position which I shall now examine, acknowledging that I do not hold myself bound by such decisions made since the revolution, although, as evidence of what the law was prior to that period, I read and respect them.

The authority of the case of *Hughes v. Cornelius*, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted; but its application to a question arising under a warranty of neutrality between the insurer and insured is denied. It is true that, in that case, the only point expressly decided was, that the sentence was conclusive as to the change of property effected by the condemnation. But it is obvious that the point decided in that case depended, not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences.

This case, as far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an English court acting upon the same subject; and we have seen that, by the general rule of law, the latter, if conclusive at all, is so as to the fact directly decided, as well as to the change of property produced by the establishment of the fact. Hence it would seem to follow, that if the sentence of a foreign court of admiralty be conclusive as to the property, it is equally conclusive of the matter or fact directly decided. What

is the matter decided in the case under consideration? That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property produced by the sentence of condemnation is a consequence of the matter decided, that she was, in effect, enemy-property. Can the parties to that sentence be bound by so much of it as works a loss of the property, because it was declared to be enemy-property, and yet be left free to litigate anew in some other form, the very point decided from which this consequence flowed? Or upon what just principle, let me ask, shall a party to a suit, who has once been heard, and whose rights have been decided by a competent tribunal, be permitted in another court of concurrent jurisdiction, and in a different form of action, to litigate the same question, and to take another chance for obtaining a different result? I confess I am strongly inclined to think that the case of *Hughes v. Cornelius* laid a strong foundation for the doctrine which was built upon it, and which for many years past has been established law in England. This opinion is given with the more confidence, when I find it sanctioned by the positive declarations of distinguished law characters — men who are, of all others, the best able to testify respecting the course of decisions upon the doctrine I am examining, and the source from which it sprung.

In the case of *Lothian v. Henderson*, 3 Bos. & Pull. 499, *Chambre, J.*, speaking upon this point, says that the sentence of the French court was in that case conclusive against the claim of the assured, “agreeable to all the decisions upon the subject, beginning with the case of *Hughes v. Cornelius* (confirmed as that was by the opinion of Lord Holt in two subsequent cases), and pursuing them down to the present period. It is true,” he observes, “that in *Hughes v. Cornelius*, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute. But from that period to the present, the doctrine there laid down respecting foreign sentences has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover.” *Le Blanc, J.*, says, “that these sentences are admissible and conclusive evidence of the fact they decide, it seems not safe now to question: From the time of *Car. II.* to this day, they have been received as such, without being questioned. In the discussion of the nature of such evidence before this house in 1776, it seems not to have been controverted; and the cases, I may say, are numberless, and the property immense, which have been determined on the conclusiveness of such evidence, in many of which cases the forms in which they came before the courts in Westminster Hall were such as to have enabled the parties, if any doubt had been entertained, to have brought the question before a higher tribunal.” *Lawrence, J.*, also speaking of the legal effect of a foreign sentence upon this point, says, “as to

which, after the continued practice which has taken place from the earliest period, in which, in actions on policies of insurance, questions have arisen on warranties, to admit such sentences in evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purport to decide directly, I apprehend it is now too late to examine the practice of admitting them to the extent to which they have been received, supposing that practice might, upon the argument, have appeared to have been doubtful at first." Rooke, J., Lord Eldon, and Lord Alvanley, all concur in giving the same testimony, that the doctrine under consideration had been established for a long period of years, by a long series of adjudication in the courts of Westminster Hall.

I cite this case for no other purpose but to prove by the most respectable testimony, that the case of *Hughes v. Cornelius*, decided in the reign of Car. II., had, by a uniform course of decisions from that time, been considered as warranting the rule now so firmly established in England. And when the inquiry is, whether the application of the principle laid down in that case to questions arising on warranties in actions on policies, be of ancient or modern date, I think I may safely rely upon the declarations of the English judges, when they concur in the evidence they give respecting the fact. It is true that no case was cited at the bar recognizing the application of the rule to questions between the insurer and insured, prior to the revolution, except that of *Fernandez v. Da Costa*, which I admit was a *Nisi Prius* decision. But were I convinced that the long series of decisions upon this point, from the time of *Hughes v. Cornelius*, spoken of by the judges in the case of *Lothian v. Henderson*, had been made at *Nisi Prius*, it would not, in my mind, weaken the authority of the doctrine. It would prove the sense of all the judges of England, as well as of the bar, of the correctness and legal validity of the rule. It is not to be supposed that if a doubt had existed respecting the law of those decisions, the point would not have been reserved for a more deliberate examination, before some of the courts of Westminster Hall. But the case of *Fernandez v. Da Costa* receives additional weight, when it is recollected that the judge who decided it was Lord Mansfield, and when upon examining it, we find no intimation from him that there was any novelty at that day in the doctrine. To this strong evidence of the antiquity of the rule, may be added that of Judge Buller, who, at the time he wrote his *Nisi Prius*, considered it as then established.

That the doctrine was considered as perfectly fixed in the year 1781, is plainly to be inferred, from the case of *Bernardi v. Mottaux*, decided in that year. Lord Mansfield speaks of it as he would of any other well established principle of law, declaring in general terms, that the sentence, as to that which is within it, is conclusive against all persons, and cannot be collaterally controverted in any other suit. The only difficulty in that case was, to discover the real ground upon which the

foreign sentence proceeded, and the court in that and many subsequent cases laid down certain principles auxiliary to the rule, for the purpose of ascertaining the real import of the sentence in relation to the fact decided as between the insurer and insured. For if the sentence did not proceed upon the ground of the property not being neutral, it of course concluded nothing against the insured; since upon no other ground could the sentence be said to falsify the warranty.

It was admitted by the counsel for the insured, that, as between him and the insurer, the sentence is *prima facie* evidence of a non-compliance with the warranty. But if they are right in their arguments as to the inconclusiveness of the sentence, I would ask for the authority upon which the sentence can be considered as *prima facie* evidence. Certainly no case was referred to, and I have not met with one to warrant the position. If we look to general principles applicable to domestic judgment, they are opposed to it. We have seen that the judgment is conclusive between the same parties, upon the same matter coming incidentally in question. The judgment of a foreign court is equally conclusive except in the single instance where the party claiming the benefit of it applies to the courts of England to enforce it, in which case only the judgment is *prima facie* evidence. But it is to be remarked, that in such a case the judgment is no more conclusive as to the right it establishes, than as to the fact it decides. Now it is admitted that the sentence of a foreign court of admiralty is conclusive upon the right to the property in question; upon what principle, then, can it be *prima facie* evidence, if not conclusive, upon the facts directly decided? A domestic judgment is not even *prima facie* evidence between those not parties to it, or those claiming under them, and that would clearly be the rule, and for a similar reason as to foreign judgments. If between the same parties, the former is conclusive as to the right and as to the facts decided. This principle, if applied at all to foreign sentences, which it certainly is, is either applicable throughout, upon the ground that the parties are the same, or if not so, then by analogy to the rule applying to domestic judgments, the sentence cannot be evidence at all.

Upon the whole, I am clearly of opinion, that the sentence of the court of admiralty at Barbadoes, condemning the brig "Fame," and her cargo as prize, on account of an attempt to break the blockade of Martinique, is conclusive evidence in this case against the insured, to falsify his warranty of neutrality.

If the injustice of the belligerent powers, and of their courts should render this rule oppressive to the citizens of neutral nations, I can only say with the judges who decided the case of *Hughes v. Cornelius*, let the government in its wisdom adopt the proper means to remedy the mischief.

OVERBY v. GORDON.

SUPREME COURT OF THE UNITED STATES. 1900.

[Reported 177 *United States*, 214.]

THE proceedings under review originated in the Supreme Court of the District of Columbia, by the filing in that court, on January 23, 1896, of a petition on behalf of Mrs. Gordon, the appellee herein. The object of the petition was to obtain the probate, as the last will and testament of Hugh A. Haralson, of a paper purporting to have been executed by Haralson, and to obtain a grant of letters of administration thereon, with the will annexed. It was averred that Haralson, at the time of his death and for several years prior thereto, had been a resident of the District of Columbia, and that he died on August 23, 1895, in the county of De Kalb, State of Georgia, possessed of personal property of the value of about ten thousand dollars, all of which, except an insignificant part thereof, was at the time in the District of Columbia.

At the trial the jury found that Haralson died domiciled in the District of Columbia, and left personal estate there.

A caveat was filed by other next of kin of Haralson contesting the validity of the alleged will and the domicile of the deceased in the District of Columbia. At the trial the caveators offered in evidence a certified transcript of record from the De Kalb Court of Ordinary, De Kalb County, in the State of Georgia. This record showed the appointment in May, 1896, of Logan Bleckley as administrator.

It is further recited in the bill of exceptions that the transcript referred to was offered as tending to show that the decedent had died a resident of De Kalb County, Georgia, intestate, "and that Mrs. Gordon was thereby estopped to deny that fact." The trial court, however, refused to admit the record in evidence, and an exception was duly taken to such refusal.

An order was entered admitting the will to probate and record as the last will and testament of the decedent, and letters of administration *cum testamento annexo* were decreed to issue to Hugh H. Gordon, a son of the petitioner. An appeal was thereupon taken by the caveators to the Court of Appeals of the District of Columbia. That court affirmed the order of the lower court (Mr. Chief Justice Alvey dissenting), (13 App. D. C. 392,) and a writ of error was then sued out from this court.¹

WHITE, J. . . . Was the grant of letters of administration by the

¹ The statement of facts is abridged, and part of the opinion is omitted. — En.

Court of Ordinary of De Kalb County, Georgia, competent evidence upon the issue tried in the Supreme Court of the District of Columbia respecting the domicile of the decedent at the time of his death?

In determining this question it is important to keep in mind the following facts:—

At the time when the proceedings before the De Kalb court were instituted (April, 1896), the estate of the deceased, with but a trifling exception, was within the District of Columbia. Not only this, but upon the ground that the domicile of Haralson at his death was the District of Columbia, the jurisdiction of a competent court of the District had been invoked as early as January 23, 1896, for the probate of an alleged last will and testament of Haralson and for the grant of letters of administration *cum testamento annexo*; and on March 6, 1896, the next of kin, other than the proponent of the alleged will, had filed a caveat in said court of the District of Columbia contesting the application for probate and grant of letters. Four days before the certification of issues framed by reason of such contest, to be tried before a jury, the caveators before the Supreme Court of the District of Columbia initiated the proceedings before the De Kalb County Court. It was upon the hearing had in the Supreme Court of the District of Columbia upon the issues certified on April 10, 1896, that the adjudication of the De Kalb County Court was offered in evidence upon the issue in respect to the domicile of the decedent at his death. . . .

As said by this court in *Veach v. Rice*, 131 U. S. 298, courts of ordinary in Georgia are courts of record, having exclusive and general jurisdiction over the estates of decedents, and no question has been raised as to the observance of the requirements of the statutes of Georgia in the proceedings which culminated in the appointment of the Georgia administrator.

The transcript referred to, however, undoubtedly only justifies the inference that none other than the statutory notice by publication was given, and that no contest was had in respect to the grant of letters.

Jurisdiction is the right to hear and decide, and it must be exercised, speaking in a broad sense, in one of two modes, — either *in rem* or *in personam*.

It will be observed that the statutory notice above referred to was not required to be directed against named individuals, nor had it for its object the obtaining of specific relief against any one, but it was to be general, and its purpose was to warn all persons that it was proposed by the court of ordinary to determine whether a legal representative should be appointed to administer the property of the deceased within the State of Georgia. The notice and proceeding was obviously intended to have no greater force or efficacy against persons resident in the State of Georgia than against individuals who might be resident without the State. It results that the proceedings referred to were not intended to constitute and did not amount to an action *in personam*.

This results from the fact that they were devoid of the elements essential to an action *in personam*; and, if not proceedings purely *in rem*, they possessed so much of the characteristics thereof, as not to warrant the allowance of greater efficacy than is accorded to a proceeding of that nature.

An essential characteristic, however, of a proceeding *in rem* is that there must be a *res* or subject-matter upon which the court is to exercise its jurisdiction. In cases purely *in rem*, as in admiralty and revenue cases for the condemnation or forfeiture of specific property, a preliminary seizure of the property is necessary to the power of the court to adjudicate at all. In other cases, where the proceedings are in form *in personam*, but the court is unable to acquire jurisdiction of the person of the defendant, by actual or constructive service of process, the action may proceed, as one *in rem* against the property of which a preliminary seizure or its equivalent has been made; or, jurisdiction may be exercised without such preliminary seizure, where the relief sought is an adjudication respecting the title to or validity of alleged liens upon real estate situate within the jurisdiction of the court. *Roller v. Holly*, 176 U. S. 398. To the class of cases where the proceedings are in form *in rem* may be added those connected with the grant of letters either testamentary or of administration.

From the record of the proceedings instituted in the De Kalb County Court it is apparent that the ultimate purpose was to adjudicate upon and decree distribution of the estate of the deceased, the appointment of an administrator being a mere preliminary step in the management and control by the court of assets of the estate. The question of domicile would seem to have been important only as establishing the particular court of ordinary which was vested with jurisdiction to administer the assets within the State of Georgia. The subject-matter or *res*, upon which the power of the court was to be exercised, was, therefore, the estate of the decedent.

The sovereignty of the State of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the State. To quote the language of Mr. Chief Justice Marshall in *Rose v. Himely*, 4 Cranch, 241, 277:—

“It is repugnant to every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*.”

As said also in *Pennoyer v. Neff*, 95 U. S. 714, 722:—

“Except as restrained and limited by the Constitution, the several States of the Union possess and exercise the authority of independent States, and two well established principles of public law respecting the jurisdiction of an independent State over persons and property are applicable to them. One of these principles is, that every State pos-

sesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . .

"The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. (Story, *Confl. Laws*, c. 2; Wheat. *Int. Law*, pt. 2, c. 2.) The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunals.' Story, *Confl. Laws*, sect. 539."

Now, it is undeniable that the sovereignty of the State of Georgia and the jurisdiction of its courts at the time of the adjudication by the De Kalb County Court, by the grant of letters of administration on the estate of Haralson, did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia, and, viewed as a step in a proceeding *in rem* relating to property within the jurisdiction of the court, the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the State of Georgia. The decisions in *Robertson v. Pickrell*, 109 U. S. 608, and in the cases there relied upon, furnish illustrations of this principle. Thus, in the case just named, it was held that the act of Congress declaring the force and efficacy which the records and judicial proceedings of one State should have in the courts of another State did not require that they should have any greater force and effect in another State than in the State where such records and judicial proceedings originated and were had; that the probate of a will in one State, by a proceeding not adversary in character, merely established its sufficiency to pass all property which could be transferred in that State by a valid instrument of that kind, and the validity of the will in that State; and that such probate did not conduce to establish the facts upon which the probate proceeded, in proceedings respecting real property situated in another State, except as permitted by the laws of such other State.

The reasoning upon which we base the conclusion that the transcript of record of the grant of letters by the De Kalb County Court was not entitled to probative force in the courts of another State in the controversy over the administration of assets not within the territorial jurisdiction of the State of Georgia, at the time the grant of letters was made, finds support in the opinion delivered by Lord Blackburn in *Concha v. Concha*, 11 App. Cas. p. 541, a case referred to in terms of approval in *Thormann v. Frame*, 176 U. S. 350, where was involved a controversy in some of its features analogous to that presented in the case at bar. The facts in the *Concha* case were as follows:—

After contest between a daughter of a decedent and the executors named in a document which purported to be a last will and testament, the paper was admitted to probate by a judge of a probate court in London, and he expressly decided, upon an issue framed in a contest between the daughter and executors as to the domicile of the decedent, in favor of the domicile being in England, and not in Chili, as was claimed by the daughter. In a subsequent action before the Court of Chancery for distribution of the assets, the daughter again sought to litigate the question as to the domicile of her father, and her right to do so was finally adjudicated by the House of Lords. The executors, or those who had succeeded them in the management of the administration suit, attempted to avail of the decree of the probate court as conclusive upon the question of domicile, first, as a proceeding *in rem*, which operated an estoppel against all the world; and, second, as a proceeding *inter partes*, operative as *res adjudicata*, by reason of the actual contest made by the daughter. The decree of the probate court, however, was held not conclusive *in rem* as to the domicile, because the finding as to domicile was not necessary to the decree of the judge of probate, nor conclusive *inter partes*, as the pending controversy was substantially between the daughter and the residuary legatee, and as the latter could not be bound by an adjudication upon a question not necessary to be litigated in the probate court, and as estoppels must be mutual, the daughter could not be bound. This decision of the House of Lords, it will be borne in mind, was as to the effect to be given in one judicial tribunal in England to the decision of another court of the same country. In the course of his opinion Lord Blackburn (who perhaps had in mind doubts intimated in the Court of Appeals, 29 Ch. D. 268, 276, as to whether the findings on which a judgment *in rem* is based, are in all cases conclusive against the world) said (p. 562):—

“What he (the Probate Judge) did decide was (and to that extent I think the decision was conclusive on everybody), that there was an executor who was entitled to have probate in England for the purpose of getting in and taking the property which was in England, and to that he was entitled if there was a will which made that executor a good executor according to the law of England; but I do not think that Sir Creswell Creswell had any power to say that the testator was or was not really a domiciled Englishman. If he had been a domiciled American or domiciled in any other country, I do not think that a decision of the judge of our probate court, saying, ‘I find him to be a domiciled Englishman, and, therefore, on that account grant probate,’ would be at all conclusive upon the court of another country to oblige them to admit that he was a domiciled Englishman, when in fact he was not; or, putting it the converse way, that if a Chilean court had chosen to say that some very wealthy man was a domiciled Chilean, and had therefore granted probate, the law of nations would require that to conclude any person from saying in this country that he was not so.”

Again, after referring to the fact that upon the executor proposing to prove the will, a caveat was entered upon which it was said the probate judge entered into an inquiry whether or not the testator was domiciled in England, and found that he was, Lord Blackburn observed (p. 564) : —

“ It is said that upon the caveat in the suit an order was drawn up, which may perhaps not mean that, but which does look extremely as if the registrar entered the judgment that the judge did find it. I cannot think that if he had done that it would have bound everybody universally as being a judgment *in rem*. I have instanced a sort of illustration of it. Supposing he had done so, and supposing that he was wrong, and the fact was that the testator had not been really domiciled in England, but had been domiciled, say, in the United States, in New York we will suppose, could it possibly have been said that the court of New York (which undoubtedly would have the same general law of nations as we have, following the law of the domicil to distribute the property) would have respected the decision of the Judge Ordinary, it establishing that this will was proved conclusively as being enough to make this person executor and the representative in England to obtain the English property — could it have been said that the Judge Ordinary having erroneously found that the testator was domiciled in England when in fact he was a domiciled citizen of the United States, it was to conclude them and conclude everybody to the fact that he was a domiciled Englishman until a foreigner had come to the court of this country to obtain a reversal? I cannot think so. If that was so, how could it as a matter *in rem* be decisive as regards the reason upon which the judge of the probate court had gone? I cannot think that it would be.”

In *Blackburn v. Crawford's Lessee*, 8 Wall. 175, and a continuation of the same action under the title of *Kearney v. Denn* (15 Wall. 51), the sole question at issue in the action (ejectment) was the validity of an asserted marriage. At the trial the defendant offered in evidence, as a conclusive estoppel against all the lessors of the plaintiff and as *prima facie* evidence to support the issue on his part, a transcript from the records of the Orphans' Court of Prince George's County, Maryland, and proposed to read therefrom the verdict of the jury and the order of the Orphans' Court thereon on certain issues sent from the Orphans' Court to the Circuit Court of said county. These issues had been framed upon a contest, initiated in the Orphans' Court, by one of the lessors of the plaintiff who resisted an application of Blackburn for the grant to him of letters of administration on the estate of a certain intestate, such lessor asserting that he was nearest of kin to the intestate, and that letters should be granted to him. The verdict in the contest was against the validity of the claimed marriage. On the trial in the action in ejectment the jury found in favor of the fact of marriage. This court — the trial judge in the action in ejectment having excluded the transcript referred to — held that the decree upon the

contest was competent evidence and operated an estoppel as against the lessor of the plaintiff who was a party to the contest, but that the adjudication did not affect the other lessors, who were not parties to such contest. Obviously, the decision proceeded upon the assumption that as the Orphans' Court possessed no general jurisdiction over the real estate of a decedent, its action upon the application for grant of letters, regarded as a proceeding *in rem*, possessed no probative force in contests over such property. This, of course, in nowise impugned the principle that all parties to a contest, in proceedings in a probate court preliminary to and during the course of administration upon the estate of the decedent, upon a matter within the jurisdiction of the court, are concluded in every other court by the decision rendered, as to the facts upon which such decision necessarily proceeded. *Caujolle v. Ferrié*, 13 Wall. 465. And see *Butterfield v. Smith*, 101 U. S. 570.

We are of the opinion that the De Kalb County Court possessed the power to determine the question of domicil of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicil, by a mere finding of such a fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such a contest as to facts which had been or might have been litigated in such contest.

Our conclusion being that the adjudication of the fact of domicil in Georgia made in the grant of letters by the De Kalb County Court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicil in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the Supreme Court of the District did not err in excluding the transcript in question, whether tendered as evidence conducing to establish or as conclusively fixing the domicil of the deceased. And this conclusion is not affected in the least by the circumstance that on the trial of the issue as to domicil had in the Supreme Court of the District of Columbia it was claimed that the assets within the District of Columbia at the time of the filing of the caveat by the next of kin had been thereafter, without the sanction of the court, removed from the District of Columbia by one of the caveators. The trial court properly declined to rule that delivery of such assets operated to protect those who made the surrender, as against an administrator appointed within the District, subsequent, it is true, to such delivery, but as the result of proceedings for the appointment of an administrator which were pending in a proper court of the District at the time of the delivery, and when the person in whose name the Georgia letters were issued was a party to the proceedings previously instituted and then pending in the District. Nor

was the trial court required to determine that upon proper application to the Georgia court the administrator appointed by the court would not be ordered to deliver up the assets removed by him from the District.

Allusion has been made to an act of Congress of February 28, 1887, c. 281, 24 Stat. 431, which makes it lawful for any person or persons to whom letters testamentary or of administration may be granted by proper authority, in any of the United States or the Territories thereof, to maintain any suit or action and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said District. We do not construe that statute, however, as having any relation to a case of the kind we are now considering. In other words, the statute cannot in reason be interpreted as directing that where a proper court of the District of Columbia had obtained jurisdiction by proceedings commenced before it for administration upon property within the District, it should be obliged to dismiss such proceedings because one who was a party before it chose, whilst issues in such proceedings were pending and undecided, to go to a State and there make application for letters of administration, basing such application upon the asserted fact that the deceased had been domiciled in such State.

Whilst it may be conceded that, in consequence of the statute, as a general rule, a debtor residing in the District of Columbia, of a deceased person, may be protected in making payment to an administrator appointed in another jurisdiction, the asserted domicile of the deceased (*Wilkins v. Ellett*, 108 U. S. 256), this does not make it necessary for us to decide that the payment or delivery of the assets in the District of Columbia, which was made to the Georgia administrator after the commencement of proceedings for the administration of the assets within the District of Columbia, based upon the ground of the domicile of the deceased having been in said District, was lawful. To determine this question would involve a consideration of other provisions of the statute, and as to whether the person making the payment was or not to be charged with notice of the then pending proceedings in the Supreme Court of the District, which, of course, were matter of public record. The question, however, is not before us for review, and we do not, therefore, express an opinion in regard thereto.

Further, in the light of the decision of the Supreme Court of Georgia in the case of *Thomas v. Morrisett*, 76 Ga. 384, and an analogous decision by the Supreme Court of Errors of Connecticut, in *Willett's Appeal from Probate*, 50 Conn. 330, it would seem altogether probable that the De Kalb County Court, upon application made to it, will order its appointee to surrender to the administrator appointed in the District of Columbia the assets which were by the former removed from the District during the pendency therein of the proceedings for administration.

Affirmed.

SECTION IV.

THE EFFECT OF A JUDGMENT ON PROPERTY.

HUGHES v. CORNELIUS.

KING'S BENCH. 1680.

[Reported 2 Shower, 232.]

TROVER brought for a ship and goods, and on a special verdict there is found a sentence in the Admiralty Court in France, which was with the defendant.

And now *per Curiam* agreed and adjudged, that as we are to take notice of a sentence in the admiralty here, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition; for suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this? It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars. If you are aggrieved you must apply yourself to the king and council; it being a matter of government he will recommend it to his liege ambassador if he see cause; and if not remedied, he may grant letters of marque and reprisal.

And this case was so resolved by all the Court upon solemn debate; this being of an English ship taken by the French, and as a Dutch ship in time of war between the Dutch and the French.

Judgment for the defendants.

CASTRIQUE v. IMRIE.

HOUSE OF LORDS. 1870.

[Reported Law Reports, 4 House of Lords, 414.]

THE ship "Ann Martin," of Liverpool, Benson, master, was supplied with necessaries at Melbourne by Messrs. Levien & Stenetz. Benson drew a bill in payment on Claus, then the owner, for the sum of £601 16s. 6d. Claus became bankrupt, and the bill was dishonored: the ves-

sel had meanwhile been transferred to Castrique, and the bill had been indorsed to Messrs. Trotteaux & Co., of Havre. The vessel being in Havre, Messrs. Trotteaux & Co. commenced in the Tribunal of Commerce there, a suit against Benson on the bill. Benson was cited and appeared, but did not defend the suit. Judgment was given against Benson as master "and by privilege on that vessel" to pay the amount. The ship was seized upon the judgment, but could not be sold till the judgment was ratified by the Civil Tribunal of the same district. That court confirmed the judgment, and, after hearing the parties interested and receiving evidence of the law of England, refused to modify its action. The Court of Appeal of Rouen affirmed the action of the Civil Tribunal of Havre. A sale of the vessel was made under order of court, and the defendant, an Englishman, became the purchaser. Upon his bringing the vessel to England, Castrique brought an action in the Court of Common Pleas to recover it, on the ground that the sale in France was illegal and void as against his earlier title. The Court of Common Pleas gave judgment for Castrique; this was reversed in the Court of Exchequer Chamber. The case was then brought up to this House on error. The judges were summoned.¹

BLACKBURN, J. My Lords, I have the honor to deliver the joint opinion of my Brothers BRAMWELL, MELLOR, BRETT, CLEASBY, and myself.² . . .

What were the nature and effect of the proceedings in France—what jurisdiction the courts there had? and what the effect of their determinations really was? are all questions depending on the French law, and it must be ascertained as a fact what that French law is. When once that fact is ascertained, it becomes a question of English law to determine what effect is to be given to it in an English court.

In the present case the parties at the trial agreed upon a statement of the facts, and gave the court authority to draw inferences from them; but, unfortunately, they have stated the facts as to the French law very imperfectly, and the result has been that the Court of Common Pleas has drawn one inference as to the French law, and the Court of Exchequer Chamber has drawn another. It is very possible that a French lawyer may justly say that neither is right; it is quite certain that both cannot be. It is now for your Lordships to determine what the proper inference is, and on that point we must express our opinion. It is quite possible that the inference we draw may not be the correct one, but we apprehend that all that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to it which is available, and *bonâ fide* to determine on that, as well as it can, what the foreign law is. If from the imperfect evidence produced before it, or its misapprehension of the

¹ This statement of facts is condensed from that of the Reporter. — Ed.

² Part of this advisory opinion is omitted. KEATING, J., delivered an advisory opinion concurring in result. — Ed.

effect of that evidence, a mistake is made, it is much to be lamented, but the tribunal is free from blame.

We think that some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties, and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the courts of common law in England are of this nature, and it is every day's experience that where the sheriff, under a *fiery facias* against A., has sold a particular chattel, B. may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the courts of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different.

It is not essential that there should be an actual adjudication on the status of the thing. Our Courts of Admiralty, when property is attached and in their hands, on a proper case being shown that it is perishable, order that it shall be sold and the proceeds paid into court to abide the event of the litigation. It is almost essential to justice that such a power should exist in every case where property, at all events perishable property, is detained.

In a recent case of *Stringer v. English and Scottish Marine Insurance Company*, in the Queen's Bench, Law Rep. 4 Q. B. 676, it appeared that the American Prize Court, *pendente lite*, ordered a valuable cargo, which was claimed as prize, to be sold, and that not only without any adjudication that it was a prize, but although the decision of the court below had been against the captors, and that decision was ultimately affirmed on appeal. We apprehend that it is clear that in all such cases courts sitting under the same authority must recognize the title of the purchaser as valid. In *Story on the Conflict of Laws*, § 592, it is said that the principle that the judgment is conclusive "is applied to all proceedings *in rem* as to movable property within the jurisdiction of the court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign

tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such courts have a rightful jurisdiction founded in the actual or constructive possession of the subject-matter."

We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from Story. We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world. . . .

LORD HATHERLEY, Lord Chancellor.¹ The question which really arises before us is this, whether or not the judgment of the French court, and the consequent sale had in pursuance of that judgment, must be treated as having changed the property of the ship. The ship was bought at that auction by a person who was a British subject, and who came here and registered himself as the owner of the vessel, and is now represented by the defendant. The question is, as to the property of the ship as between Castrique and the defendant.

We have been assisted with the opinions of the learned judges in this case, and I entirely concur in the conclusion at which they have arrived. It appears to me, in the first place, desirable to consider whether this judgment must be taken as a judgment by the French court *in rem*, or whether it is to be taken as a judgment purporting only to deal with the interest in the vessel, whatever that interest might be, of Benson, who was the debtor in the action on the bill, and as giving no further or other right than such interest as Benson had. As it was stated by the learned judges, we are familiar in our law with that distinction; we are familiar with the course taken by the Court of Admiralty in proceedings against a ship, selling a ship, and giving a title against all third persons who become purchasers under a decree of that court; we are familiar also with the course taken by our own courts of law in decreeing judgment of any property of a debtor taken by levy upon his goods, in which case the interest of the debtor in the chattel is sold, and that interest alone, and no further or other right than that possessed by the debtor, can be transferred to persons purchasing under that sale. In other words, they purchase simply the interest of the debtor in that chattel.

¹ Part of this opinion, and the concurring opinions of Lords CHELMSFORD and COLONSAÏ, are omitted.—ED.

If we look at the course of proceedings to see what were the intent and purpose and duty of the French courts, and if we ask did they proceed in this course which they took in directing the sale of the vessel as against the vessel itself, we find that there has been a difference of opinion upon that point between the Court of Common Pleas and the Court of Exchequer Chamber. The Court of Common Pleas thought that it was not a proceeding against the ship itself, but simply against such interest as the debtor had therein, while the Court of Exchequer Chamber came to the conclusion that it was a proceeding against the ship itself. Now, I entirely concur in the remarks of the learned judges who have assisted us in this case, that, unfortunately, the case being one of foreign law, which we must consider as a fact laid before us, it has not been stated in the special case, with all the clearness which would have been desirable, what that law is. But what is there stated it appears to me is sufficient to indicate upon the whole the course taken by the French courts and the grounds of their proceeding. In the first place, it was a proceeding against Benson and the ship which originated the matter. That being so, I think that it would be very difficult to say that a proceeding *in rem* was not one of the matters contemplated in the original judgment. The judgment of the Tribunal of Commerce was a judgment against Benson. He had desired not to be made personally liable, as the expression here is, in respect of this judgment, and it was given against him "by privilege upon the ship." The ship was then directed to be sold. A good deal of argument turned upon that expression, "by privilege upon the ship." The case was argued extremely ably by Mr. Matthews at your Lordships' bar. He put the case to us thus: What was meant was no more than this, that when the ship should be sold the captain, by virtue of the French law, would be a privileged creditor, and would be entitled to be paid out of the first proceeds of the sale, but that it did not necessarily follow from this circumstance that the sale was ordered to be made as against all persons having an interest in the ship. He put it in this way, that it might be treated as if the court had regarded the whole matter thus: that he, Benson, would have a certain amount of interest in the ship by virtue of such privilege as he might have, and the court might merely mean to sell all such amount of interest as Benson had, and therefore to dispose only of those rights which he possessed in priority to others, and to the amount which might be due to him as captain in respect of any claim he had in that capacity upon the ship; in other words, to sell exactly what was due to Benson as captain, and not to sell the ship, *per se*, for any other purpose whatever.

But, as was well observed by the learned judges, in the first place this privilege could only arise after the sale of the ship had taken place to give him a priority over other creditors interested in disposing of the vessel. But further than that, regard being had to the original proceeding, being a proceeding against Benson and the ship, and Ben-

son himself being excluded from any personal liability, and the judgment against him being by privilege upon the ship, it does appear to me that the word "privilege," as used here, is used much more in the sense in which it is used by Lord Tenterden in his work upon shipping, of a charge upon a vessel which the person is entitled to realize by sale, than in the sense of saying simply that amongst all the several persons who may have claims when the ship comes to be sold, Benson is to stand in a favored position. In other words, the French court intended by the proceeding taken to adjudge the sale of the vessel in order to satisfy this privilege.

But, beyond that, I think the case becomes somewhat clearer when it is carried to the Civil Tribunal, which was called upon to affirm the judgment of the Tribunal of Commerce, and give efficacy to the dealing with the ship. What course did the Civil Tribunal take? It summoned all who were supposed to be the owners of the ship. The judges of that court only knew of Claus and Claus's assignee — they did not know any of the mortgagees whose titles did not appear upon the ship's papers; at all events, they considered, if anything was said about them, that they could pay no attention to persons of whom they could have no knowledge except through the medium of the ship's papers. For what purpose did they call Claus and his assignee? For the purpose of making them liable upon the bill, not because Claus had accepted it, but only because, being interested in the thing they were about to sell, they thought it right that Claus and his assignee should be present.

Therefore, upon the whole proceeding, taking first the proceeding against Benson and the ship, next, the detainer of the vessel by the Tribunal of Commerce for the purpose of the sale being affirmed by the Superior Court, and then the Superior Court when it arrives at the question of sale or no sale, taking care to summon those whom alone it could recognize as owners, I think there can be no doubt that the judgment of the court was intended to be a judgment *in rem*, and therefore the court intended to do that which by the French law it did, namely, to transfer the ownership in the vessel.

That being so, the only remaining point is this: it is said that the French judges decided against our English law; that the effect of our law was laid before them, and that they disregarded it and determined the case contrary to what the law of this country would be. It is said that the law of the flag should have governed the decision of the French courts with reference to this vessel, and therefore, the courts having come to an erroneous conclusion, the judgment that they erroneously gave and so acted upon would not here confer a title upon those who in France undoubtedly, under that judgment, did acquire it.

Now, my Lords, without expressing any opinion (for I purposely wish to avoid doing so) with reference to a decision of my own which has been cited, in the case of *Simpson v. Fogo*, 1 Jo. & H. 18: 1 H. & M. 195, as to what might be done in the case of a court wilfully deter-

mining that it will not, according to the usual comity, recognize the law of other nations when clearly and plainly put before it, without saying anything as to what would justify the courts in our own country in hesitating to give effect to a foreign judgment if obtained by fraud or misrepresentation, it is enough for me to say upon the present occasion, that, in this case, the whole of the facts appear to have been inquired into by the French courts judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in France in deciding as they did decide. That decision confirmed the title by sale to the person who became the purchaser at the sale. According to the law of France that title could not be thereafter disputed or disturbed, the court at Rouen being the highest court having jurisdiction in the matter.

That being so, there being neither a case of refusal to attend or listen to anything that might be said to them with reference to our own law, nor to adopt that as the ground of their conclusion, and there being no case, as far as I know, of any fraudulent representation or concealment with reference to any facts in the case, and the decision having been come to and pronounced, not, as in one of the cases which was cited, in the absence of the parties, but in Castrique's own suit, where he had every opportunity of bringing forward his own case, the decision cannot be complained of as one contrary to justice through its being pronounced in the absence, from want of citation, of any of the parties interested, I therefore think we are bound to give effect to the conclusion arrived at by the French court, and to the title derived through the medium of that conclusion, and that the court of Exchequer Chamber was right in the decision to which it came. And, therefore, I have to submit to your Lordships that the decision of the Court of Exchequer Chamber ought to be affirmed.

Judgment of Court of Exchequer Chamber affirmed.

CHAPTER XVI.

OBLIGATIONS.

SECTION I.

PENAL OBLIGATIONS.

DE BRIMONT v. PENNIMAN.

CIRCUIT COURT OF THE UNITED STATES, SO. DIST. NEW YORK. 1873.

[Reported 10 Blatchford, 436.]

WOODRUFF, J. This is an action of debt. The declaration contains two counts. The first is founded on an alleged judgment or decree pronounced in the then Empire of France; the other count is debt on simple contract, for interest alleged to be due to the plaintiff, for the forbearance of moneys due and owing by the defendants to the plaintiff. The first count only is demurred to. That count alleges, that the plaintiff is an alien and a citizen of the French Republic, and that the defendants are citizens of the United States and of the State of New York; that, on the 16th of March, 1868, at Paris, in the then Empire of France, the plaintiff intermarried with the daughter of the defendants; that a child of the marriage was born, who is still living; and that, on the 7th of February, 1869, such daughter, (the wife of the plaintiff,) died. The declaration then sets out certain articles of the Code Civil of France, which provide that children must make an allowance to their father and mother, and other ancestors, who are in need; that sons-in-law and daughters-in-law must, also, in like circumstances, make an allowance to their fathers-in-law and mothers-in-law, but this obligation ceases, first, when the mother-in-law contracts a new marriage, and second, when that one of the married couple through whom the relation of affinity exists is dead and the children born of such couple are also dead; that the obligations springing from the foregoing provisions are reciprocal; and that an allowance is only to be granted in proportion to the necessities of him who claims, and to the means of him who is bound to pay. It is next averred, that, at and prior to the said intermarriage, and at the time of the rendition of the judgment and decree next mentioned, and subsequently to such decree, the defendants were residents of the Empire of France, had the benefit of its laws, and owed to it a temporary allegiance; that, on the 14th of August, 1869, the Civil Tribunal, (particularly mentioned,) at Paris, rendered and pronounced judgment, in an action there pending, wherein the said plaintiff was plaintiff and the said defendants were defendants,

brought by the plaintiff, to obtain an allowance from the defendants, under the said articles of the Code Civil; that the defendants, jointly and severally, pay to him 18,000 francs per year, in equal monthly payments in advance, such payments to be made from the time that such allowance was first demanded, and should be 6,000 francs for the use of said plaintiff, and 12,000 francs for the use of the said child of the plaintiff and of said daughter of the defendants; that the defendants were both duly served with process in said action and appeared therein; that the said Civil Tribunal was a court of the Empire of France, and had jurisdiction of the subject-matter of the action and of the parties; that the defendants appealed from the said judgment to the Court Imperial of Paris; that such appeal was there prosecuted by the plaintiff and the defendants, and, on the 5th of May, 1870, such appellate court adjudged and decreed, that the before-mentioned judgment be affirmed in respect of the right of the plaintiff to an allowance, and in respect of the amount, to wit, 18,000 francs per year, and of the appropriation thereof by the plaintiff, to wit, 6,000 francs to the use of the plaintiff and 12,000 thereof to the use of the said child, and in respect of the times and manner in which it should be paid to the plaintiff, to wit, in equal monthly payments, in advance, and did adjudge and decree, that the defendants, jointly and severally, pay to the plaintiff the said sum, and pay the same from the day of the decease of their said daughter, February 7, 1869, as appears, etc., by the records and proceedings of said court, now remaining of record; that the said judgment and decree of the Court Imperial is final and conclusive, and is in full force, not reversed or annulled or satisfied, etc.; that such court is a court of general jurisdiction, and had jurisdiction of the subject-matter and of the parties; and that the plaintiff has not yet obtained satisfaction of the said judgment, whereby an action hath accrued to him to have and demand of the defendants, jointly and severally, the sum of \$10,200, being the value, in currency of the United States, of the sum of 48,000 francs, in which said last-mentioned sum the defendants are, jointly and severally, indebted to the plaintiff, by reason of the said judgment, for the time beginning the 7th of February, 1869, and ending the 7th of November, 1871.

The defendant James F. Penniman demurs to this count, upon various grounds, which I do not think it necessary to enumerate. They were urged on the argument, and, by not noticing many of them further, I am not to be deemed to affirm the sufficiency of the declaration in respect thereto. It is sufficient that the principal question is decided. That question is, whether an action of debt will lie in this court, upon such a decree of a court in France, made against citizens of the United States, husband and wife, temporarily resident in that Empire?

It may not be irrelevant to state, that, besides the articles of the French Code inserted in the declaration, the counsel for the plaintiff admitted, on the argument, and he has stated on his brief, that it is

provided, by other articles of that Code, that the duty to make the allowance which the decree in question provides, ceases whenever the claimant obtains a fortune sufficient for his own support, or the party by whom the payment is to be made becomes unable to pay, or cannot pay without withdrawing means which are required for his own necessities.

The question is novel. No case has been cited by counsel in which a foreign judgment of such a nature has been the subject of an action in this country or in England; and no such case has fallen under my observation. Cases are numerous in which foreign judgments for the recovery of a definite sum of money have been sued upon; and the question has been largely discussed, whether such judgments are conclusive, or are merely *prima facie*, evidence of the debt which they award, and whether, and to what extent, the subject-matter is open to inquiry and proofs, on the original merits. Those cases are not controverted by the counsel for the defendant, but they are deemed not to apply to such a decree as is set out in this declaration. Cases are also numerous in which the force and effect of judgments and decrees in the courts of one of the States of the United States are under consideration in the courts of other of the States, or in the federal courts. Those cases are not deemed to apply to the present, because the Constitution of the United States operates, as between the States, to give them an efficiency not due to a foreign judgment or decree.

In determining the precise question, whether, upon the facts stated in the declaration, the plaintiff shows a cause of action, it may not be material to decide whether such a judgment is, in this court, to be regarded as conclusive, or only *prima facie*, evidence of the indebtedness claimed by the plaintiff; for, if it be either, then, in connection with the allegations showing the law and the relationship of the parties, a demurrer founded in denial of legal liability could not, probably, be sustained. The cases, therefore, which discuss that distinction need not be considered.

The broad question, whether a citizen of the United States, whose daughter marries in France, can be prosecuted here upon a decree of a French court, requiring him and his wife to pay an annuity for the support of their son-in-law, is prior to the inquiry last above referred to. The subject pertains to the domestic relations of our own citizens, and the duties and obligations resulting therefrom; and the decree in question proceeds upon the declaration of an obligation not in conformity with our laws, not known to the common law, and upon the continuance of the obligation itself after the relationship out of which it is deemed to have arisen has ceased by the death of the person through whom the affinity was traced. The nearest analogy to a decree of the nature in question, to which my attention is called, is a decree for alimony, where a divorce, total or partial, has been granted; but the only cases in which such a decree has been held to support an action in another jurisdiction are under the influence of the Constitution of the

United States, and, by force of that Constitution, it was held that a suit would lie, in a Court of Chancery, to compel the performance of the decree. *Barber v. Barber*, 21 How. 582.

It is not irrelevant to a consideration of the nature of the decree in question, to say, that it does not proceed upon the rule of obligation recognized by all civilized nations, that the parent shall support his children during minority, which involves, also, the correlative right to the services of those children while thus supported. Such an obligation has no relation to the case under consideration. Whatever obligation or duty lies at the foundation of the claim of this plaintiff is the creature of positive statute, framed for the people of France, to regulate their domestic concerns, protect the public, and guard against pauperism and its evils. Statutes in some respects similar are found in England, and in most, if not all of the States of this country. The duty of parents and grandparents, and, reciprocally, of children and grandchildren when of sufficient ability, to provide for the necessary support of those relatives, and prevent their becoming a charge to the public, is declared and is enforced. Such regulations are local in their nature and in their application, and so are the orders for their enforcement. They are a part of a local system, to provide for paupers, and to relieve the public from their maintenance, when they have relatives within certain designated degrees, who are of ability to support them. Such orders are subject to modification and adjustment, as circumstances may require, in the States and tribunals wherein they are made. Apart from questions growing out of the Federal Constitution, they can only be enforced in the States where they are made. Orders of filiation are of a similar character. They are mainly for the protection of the public, founded on local statutes, and are in the nature of domestic police regulations. The provisions of the Code of France, set out in the declaration, and the decree of the courts founded thereon, are of the like nature. It would seem, that the policy of that country, as viewed by its courts, does not require that the son-in-law or other claimant shall himself do anything for his own support, but that he is to be supported in idleness. That is probably not a matter of importance to the present inquiry, except so far as it may tend to show that the judgment or decree is hostile to the policy of this country, and in conflict with the only ground upon which orders arbitrarily imposing upon one the burden of supporting another would be tolerated. The principle upon which foreign judgments receive any recognition in our courts is one of comity. It does not require, but rather forbids it, when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens. The courts of this country will be slow to hold that, whenever an American citizen shall visit France, and reside there temporarily with his family, his son or his daughter, by a rash or imprudent marriage, can cast upon the parents, mother as well as father, the perpetual burden of an annuity for the support of the wife or

husband. So long as such residence continues, no doubt, the parents must submit to the laws of France. The orders of her courts may be enforced against them, as those laws may prescribe; but, in a matter of this kind, those laws must be executed there, and such decrees can have, and ought to have, no extraterritorial significance. They rest upon no principles of universal acceptance, like the obligation of contracts, or the protection of generally recognized, private, personal rights. No disposition to deal with foreign judgments, so as to promote the ends of justice, demands that such decrees should be arbitrarily enforced in our courts.

Beyond these considerations, I think it plain, upon the face of the declaration, and, especially where the other admitted provisions of the French Code (stated by the counsel) are brought into view, that the decree itself should be deemed, and would, in France itself, be deemed, local and provisional, and designed to be carried into effect there, and only upon persons and property found there. Their laws contemplate the supervisory control and direction of their courts over the parties, in all the changes which may occur in their relative pecuniary conditions. The decree in question prescribes a temporary rule of allowance and provision for support, subject to modification according to circumstances. There is no award of any sum certain, to be presently paid, and the declaration does not show that any sum whatever could even there be collected, without a further application to the court, for some process or other award of means by which some definite amount shall be collected. Continuing necessity, on the one hand, and continuing ability, on the other, are assumed for the future, and the absence of either makes even the decreed allowance to cease. Without assuming to say that the father-in-law and mother-in-law, if still in France, would not have the *onus* of showing that circumstances had changed, and of procuring a modification of the decree thereupon, these observations bear pertinently on the nature of the decree itself, and with great force on the question how such decree is to be treated in our own courts.

In harmony with what has been already suggested, I add, that we cannot hold that such decree is final, operative, and binding unless and until the defendants go to France and there appeal to the discretion of their courts to modify the decree according to the new circumstances which may arise; and yet, the claim here made, in regard to the effect of the decree in our courts, would require us to give judgment in accordance therewith, even though the defendants offered to prove, and could prove, that the plaintiff had come to a princely inheritance.

Without, therefore, considering the other alleged imperfections in the declaration, or the peculiarity of a decree which charges the wife of the demurrant personally, or the want of any averment that she has any separate estate which can be charged by this court, I am of opinion, that the defendant James F. Penniman is entitled to judgment upon his demurrer.¹

¹ But see *Indiana v. Helmer*, 21 La. 370. — Ed.

HUNTINGTON v. ATTRILL.

SUPREME COURT OF THE UNITED STATES. 1892.

[Reported 146 United States, 657.]

GRAY, J.¹ This was a bill in equity filed March 21, 1888, in the Circuit Court of Baltimore City, by Collis P. Huntington, a resident of New York, against the Equitable Gas Light Company of Baltimore, a corporation of Maryland, and against Henry Y. Attrill, his wife and three daughters, all residents of Canada, to set aside a transfer of stock in that company, made by him for their benefit and in fraud of his creditors, and to charge that stock with the payment of a judgment recovered by the plaintiff against him in the State of New York, upon his liability as a director in a New York corporation, under the statute of New York of 1875, c. 611. . . . On June 30, 1880, Attrill, as a director of the company, signed and made oath to, and caused to be recorded, as required by the law of New York, a certificate which he knew to be false, stating that the whole of the capital stock of the corporation had been paid in, whereas in truth no part had been paid in; and by making such false certificate became liable, by the law of New York, for all the debts of the company contracted before January 29, 1881, including its debt to the plaintiff. . . .

¹ Part of the opinion is omitted. — Ed.

The bill prayed that the transfer of shares in the gas company be declared fraudulent and void, and executed for the purpose of defrauding the plaintiff out of his claim as existing creditor; that the certificates of those shares in the name of Attrill as trustee be ordered to be brought into court and cancelled; and that the shares "be decreed to be subject to the claim of this plaintiff on the judgment aforesaid," and to be sold by a trustee appointed by the court, and new certificates issued by the gas company to the purchasers; and for further relief.

One of the daughters demurred to the bill, because it showed that the plaintiff's claim was for the recovery of a penalty against Attrill arising under a statute of the State of New York, and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the State of Maryland. . . .

The Circuit Court of Baltimore City overruled the demurrer. On appeal to the Court of Appeals of the State of Maryland, the order was reversed, and the bill dismissed. 70 Md. 191.

The ground most prominently brought forward and most fully discussed in the opinion of the majority of the court, delivered by Judge Bryan, was that the liability imposed by section 21 of the statute of New York upon officers of a corporation, making a false certificate of its condition, was for all its debts, without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained, and was intended as a punishment for doing any of the forbidden acts, and was, therefore, in view of the decisions in that State and in Maryland, a penalty which could not be enforced in the State of Maryland; and that the judgment obtained in New York for this penalty, while it "merged the original cause of action so that a suit cannot be again maintained upon it," and "is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings," yet did not change the nature of the transaction, but, within the decision of this court in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, was in its "essential nature and real foundation" the same as the original cause of action, and therefore a suit could not be maintained upon such a judgment beyond the limits of the State in which it was rendered. pp. 193-198. . . .

A writ of error was sued out by the plaintiff and allowed by the Chief Justice of the Court of Appeals in Maryland. . . .

Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. . . .

The test whether a law is penal, in the strict and primary sense, is

whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: " Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Bl. Com. 2. . . .

Upon the question what are to be considered penal laws of one country, within the international rule which forbids such laws to be enforced in any other country, so much reliance was placed by each party in argument upon the opinion of this court in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, that it will be convenient to quote from that opinion the principal propositions there affirmed:

" The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." p. 290.

" The application of the rule of the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered." p. 291.

" The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." pp. 292, 293.

" The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State." p. 299. . . .

The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in *Dennick v. Railroad Co.*, 103 U. S. 11. . . .

That decision is important as establishing two points: 1st. The court considered "criminal laws," that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extraterritorially. 2d. A statute of a State, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, might be enforced in a Circuit Court of the United States held in another State, without regard to the question whether a similar liability would have attached for a similar cause in that State. . . .

The provision of the statute of New York, now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or *quasi* criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers; and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security, for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country. . . .

It is true that the courts of some States, including Maryland, have declined to enforce a similar liability imposed by the statute of another State. But, in each of those cases, it appears to have been assumed to be a sufficient ground for that conclusion, that the liability was not founded in contract, but was in the nature of a penalty imposed by statute; and no reasons were given for considering the statute a penal law in the strict, primary, and international sense. *Derrickson v. Smith*, 3 Dutch. (27 N. J. Law), 166; *Halsey v. McLean*, 12 Allen, 438; *First National Bank v. Price*, 33 Md. 487.

It is also true that in *Steam Engine Co. v. Hubbard*, 101 U. S. 188, 192, Mr. Justice Clifford referred to those cases by way of argument. But in that case as well as in *Chase v. Curtis*, 113 U. S. 452, the only point adjudged was that such statutes were so far penal that they must be construed strictly; and in both cases jurisdiction was assumed by the Circuit Court of the United States, and not doubted by this court, which could hardly have been if the statute had been deemed penal within the maxim of international law. In *Flash v. Conn*, 109 U. S. 371, the liability sought to be enforced under the statute of New York was the liability of a stockholder arising upon contract; and no question was presented as to the nature of the liability of officers.

But in *Hornor v. Henning*, 93 U. S. 228, this court declined to consider a similar liability of officers of a corporation in the District of Columbia as a penalty. See also *Neal v. Moultrie*, 12 Ga. 104; *Cady v. Sanford*, 53 Vt. 632, 639, 640; *Nickerson v. Wheeler*, 118 Mass. 295, 298; *Post v. Toledo, &c. Railroad*, 144 Mass. 341, 345; *Woolverton v. Taylor*, 132 Ill. 197; *Morawetz on Corporations* (2d ed.), § 908.

The case of *Missouri Pacific Railway v. Humes*, 115 U. S. 512, on which the defendant much relied, related only to the authority of the legislature of a State to compel railroad corporations, neglecting to provide fences and cattle-guards on the lines of their roads, to pay double damages to the owners of cattle injured by reason of the neglect; and no question of the jurisdiction of the courts of another State to maintain an action for such damages was involved in the case, suggested by counsel, or in the mind of the court.

The true limits of the international rule are well stated in the decision of the Judicial Committee of the Privy Council of England, upon an appeal from Canada, in an action brought by the present plaintiff against Attrill in the Province of Ontario upon the judgment to enforce which the present suit was brought. The Canadian judges, having in evidence before them some of the cases in the Court of Appeals of New York, above referred to, as well as the testimony of a well-known lawyer of New York that such statutes were, and had been held by that court to be, strictly penal and punitive, differed in opinion upon the question whether the statute of New York was a penal law which could not be enforced in another country, as well as upon the question whether the view taken by the courts of New York should be conclusive

upon foreign courts, and finally gave judgment for the defendant. *Huntington v. Attrill*, 17 Ont. 245, and 18 Ont. App. 136.

In the Privy Council, Lord Watson, speaking for Lord Chancellor Halsbury and other judges, as well as for himself, delivered an opinion in favor of reversing the judgment below, and entering a decree for the appellant, upon the ground that the action "was not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the State of New York for punishment of an offence against their municipal law." The fact that that opinion has not been found in any series of reports readily accessible in this country, but only in 8 Times Law Reports, 841, affords special reasons for quoting some passages.

"The rule" of international law, said Lord Watson, "had its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of some one representing the public; were local in this sense, that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex loci*, ought to be admitted in the courts of any other country. In its ordinary acceptation, the word 'penal' might embrace penalties for infractions of general law, which did not constitute offences against the State; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs, which was the very essence of the international rule."

After observing that, in the opinion of the Judicial Committee, the first passage above quoted from *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 290, "disclosed the proper test for ascertaining whether an action was penal within the meaning of the rule," he added: "A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the State whose law had been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies were presumably enacted in the interest and for the benefit of the community at large; and persons who violated those provisions were, in a certain sense, offenders against the State law as well as against individuals who might be injured by their misconduct. But foreign tribunals did not regard those violations of statute law as offences against the State, unless their vindication rested with the State itself or with the community which it represented. Penalties might be attached to them, but that circumstance would not bring them within the rule, except in cases where those penalties were recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter was regarded as an *actio*

popularis pursued, not in his individual interest but in the interest of the whole community."

He had already, in an earlier part of the opinion, observed: "Their lordships could not assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the State of New York. They had to construe and apply an international rule, which was a matter of law entirely within the cognizance of the foreign court whose jurisdiction was invoked. Judicial decisions in the State where the cause of action arose were not precedents which must be followed, although the reasoning upon which they were founded must always receive careful consideration and might be conclusive. The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced, and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case, and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal."

In this view that the question is not one of local, but of international law, we fully concur. The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.

In this country, the question of international law must be determined in the first instance by the court, State or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. *Burgess v. Seligman*, 107 U. S. 20, 33; *Texas & Pacific Railway v. Cox*, 145 U. S. 593, 605, above cited. If a suit on the original liability under the statute of one State is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. *New York Ins. Co. v. Hendren*, 92 U. S. 286; *Roth v. Ehman*, 107 U. S. 319. But if the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed

by recovering judgment upon it. This was directly adjudged in *Wisconsin v. Pelican Ins. Co.*, above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other.

If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense. . . .

The judgment rendered by a court of the State of New York, now in question, is not impugned for any want of jurisdiction in that court. The statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law in the international sense. The faith and credit, force and effect, which that judgment had by law and usage in New York, was to be conclusive evidence of a direct civil liability from the individual defendant to the individual plaintiff for a certain sum of money, and a debt of record, on which an action would lie, as on any other civil judgment *inter partes*. The Court of Appeals of Maryland, therefore, in deciding this case against the plaintiff, upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith, credit, and effect to which it was entitled under the Constitution and laws of the United States.

*Judgment reversed, and case remanded to the Court of Appeals of the State of Maryland for further proceedings not inconsistent with the opinion of this court.*¹

FULLER, C. J., dissented: LAMAR and SHIRAS, JJ., did not sit.

¹ *Acc.* *Huntington v. Attrill*, [1893] A. C. 150. *Contra*, *First Nat. Bank v. Price*, 33 Md. 487; *Halsey v. McLean*, 12 All. 438; *Derrickson v. Smith*, 3 Dutch. 166; *Woods v. Wicks*, 7 Lea, 40. — ED.

SECTION II. — OBLIGATIONS EX DELICTO.

GARDNER v. NEW YORK AND NEW ENGLAND R. R.

SUPREME COURT OF RHODE ISLAND. 1892.

[Reported 17 *Rhode Island*, 790.]

TILLINGHAST, J. This is an action of trespass on the case, to recover damages for injuries alleged to have been sustained by the negligence of the defendant corporation.

The accident occurred at a grade crossing on the defendant's road at Danielsonville, in the State of Connecticut; and the third count of the plaintiff's declaration is based upon sections 3553 and 3554 of the General Statutes of said State of Connecticut, which are set forth in said count.

These sections are as follows: —

"SECT. 3553. Every engine used upon any railroad shall be supplied with a bell of at least thirty-five pounds' weight, and a suitable steam whistle, which bell and whistle shall be so attached to such engine as to be conveniently accessible to the engineer, and in good order for use.

"SECT. 3554. Every person controlling the motions of any engine upon any railroad shall commence sounding the bell or steam whistle attached to such engine when such engine shall be approaching, and within eighty rods of, the place where said railroad crosses any highway at grade, and keep such bell or whistle occasionally sounding until such engine has crossed such highway; and the railroad company in whose employment he may be shall pay all damages which may accrue to any person in consequence of any omission to comply with the provisions of this section; and no railroad company shall knowingly employ any engineer who has been twice convicted of violating the provisions of this section."

The defendant has demurred to said third count in the plaintiff's declaration, on the ground that the said statute, upon which it is based, is penal in its nature, and, being a statute of another State, there can be no recovery under it beyond the territory in and for which it was enacted.

The plaintiff makes no contention that a penal statute has any extraterritorial force, but simply claims that the statute counted on is remedial only, and not penal in its nature.

The only question raised by the demurrer therefore is, whether said section 3554 is penal in its nature.

A penal statute is one by which some punishment is imposed for a violation of the law. A statute may be penal in one part and remedial in another: Sutherland on Statutory Construction, § 208, and cases cited; and in such case, when it is sought to enforce the penalty, it is to be construed as a penal statute: and when it is sought to enforce the civil remedy provided, it is to be construed as remedial in its

nature. While the statute before us imposes a duty upon the defendant corporation with regard to the giving of signals at grade crossings, it does not impose any penalty for the neglect or violation of such duty. The only punishment, if such it may properly be called, for such neglect or violation of duty, is the damages to which it may subject itself at the suit of the party who is injured by reason thereof.

It is true that the last clause of said section 3554 reads like a penal statute, in that it provides that "no railroad company shall knowingly employ any engineer who has been twice convicted of violating the provisions of this section." But, notwithstanding this prohibition upon the railroad company, there is no penalty provided for its violation; nor is there any mode provided, so far as we are informed, whereby an engineer may be convicted for violating the provisions of said statute.

We are therefore of the opinion that said statute is not penal either in whole or in part, but remedial only. It simply provides that a railroad company shall pay all damages which may accrue to any person in consequence of any omission to comply with the provisions thereof. And it is well settled that where a statute only gives a remedy for an injury against the person committing it to the person injured, and the recovery is limited to the amount of loss sustained, or to cumulative damages, as compensation for the injury, it falls within the class of remedial statutes. *Blaine v. Curtis*, 59 Vt. 120; *Brice v. Gibbons*, 8 N. J. Law, 324.

There are cases which even go to the extent of holding that statutes giving double damages for injuries sustained by reason of the neglect of towns to keep their highways in repair, and for injuries by dogs, are remedial and not penal, the cumulative damages being given as compensation. *Stanley v. Wharton*, 9 Price, 301. See *Reed v. Northfield*, 13 Pick. 94; *Mitchell v. Clapp*, 12 Cush. 278; *Palmer v. York Bank*, 18 Me. 166; *Bayard v. Smith*, 17 Wend. 88.

The counsel for the defendant contends that the statute relied on by the plaintiff in the count demurred to is very similar to the one relied on in *O'Reilly v. N. Y. & N. E. R. R. Co.*, 16 R. I. 388, 392, which last named statute this court held to be penal in its nature. We fail to see the similarity between these two statutes. In the Massachusetts statute relied on by the plaintiff in the case last cited, the railroad company is subjected to liability where, by reason of its carelessness, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in its employment, is lost. "The provision for such case," said Durfee, C. J., in delivering the opinion of the court, "is, that the offending corporation may be punished by fine, or indictment, or suit for damages in an action of tort, the fine imposed, or the damages recovered, according as one or the other remedy is pursued, to be not less than five hundred nor more than five thousand dollars; the damages, in case the corporation is civilly

prosecuted, *to be assessed with reference to the degree of culpability of the corporation or of its servants or agents.*"

That statute clearly comes within the definition of a penal statute as above given. A penalty is attached for its violation, and a mode is provided for the recovery of such penalty, while, in the statute before us in this case, there is no penalty attached to the violation thereof.

Demurrer overruled.

WALSH v. NEW YORK AND NEW ENGLAND RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[Reported 160 Massachusetts, 571.]

HOLMES, J.¹ This is an action of tort to recover for a personal injury suffered by the plaintiff in Connecticut. . . .

If, however, we assume, as was ruled and as we do assume, that if the accident had happened in this State the plaintiff could not have recovered, it is argued that he cannot recover now. A decision in Wisconsin and language from some English cases are cited which more or less favor this contention. *Anderson v. Milwaukee & St. Paul Railway*, 87 Wis. 321; *The Halley*, L. R. 2 P. C. 193, 204; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28, 29; *The M. Moxham*, 1 P. D. 107, 111. Possibly, when it becomes material to scrutinize the question more closely, the English law will be found to be consistent with our views. But however this may be, we are of opinion that, as between the States of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties. See *Higgins v. Central New England & Western Railroad*, 155 Mass. 176. It is unnecessary to consider whether we should be prepared to adopt in its full extent what is thought by the learned editor of *Story, Conflict of Law* (8th ed.), § 625, note *a*, to be the true doctrine, — that "whether the domestic law provides for redress in like cases should in principle be immaterial, so long as the right is a reasonable one and not opposed to the interests of the State." The cases cited, *Dennick v. Railroad Co.*, 103 U. S. 11, and *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48, go further than the decisions of this State. *Richardson v. New York Central Railroad*, 98 Mass. 85. The policy of the supposed Connecticut rule cannot be said to be opposed to that prevailing here, even apart from statute. See St. 1893, c. 359.

*Exceptions overruled.*²

¹ Part of the opinion is omitted. — Ed.

² *Acc. Herrick v. M. & S. L. R. R.* 31 Minn. 11. — Ed.

SECTION III.

OBLIGATIONS EX CONTRACTU.

HOPE v. HOPE.

CHANCERY. 1857.

[Reported 8 De Gaz, Macnaghten & Gordon, 731.]

THIS was an original hearing of a demurrer by the defendant, John Adrian Hope, to an amended bill filed by his wife, Mathilde Emilie Hope. The substance of the case stated by the original bill was as follows:—

The marriage between the plaintiff, who was a Frenchwoman, and the defendant, who was an Englishman, took place, in 1845, in England. For some years after the marriage the husband and wife resided in France, where they became domiciled, and where their five children were born. In consequence of differences which arose between the plaintiff and the defendant, the latter, in the early part of 1853, sent all the children to England; but on the 21st of May in that year the two youngest, Adrian Elias and John Henry, were allowed by the defendant to be taken back to France, and were restored to Mrs. Hope. Proceedings took place before the French tribunals with respect to the custody of the children, and in August, 1853, the plaintiff instituted a suit against her husband in the Consistory Court of London in order to obtain a decree of divorce on the ground of cruelty and adultery, to which Mr. Hope filed a responsive allegation. On the 11th of November, 1853, the five infant children filed a bill in chancery by their next friend, praying that Mrs. Hope might be ordered to deliver up Adrian Elias and John Henry to their father in order that they might be brought up and educated in England, and on the 7th of June, 1854, the Lord Chancellor made an order in that suit that Mr. and Mrs. Hope should take all such steps as might be necessary and proper according to the law of France to cause the children to be delivered up to their father, but that he should permit Mrs. Hope to have access to them at all reasonable times (See 4 De G., M. & G. 329). Mrs. Hope presented a petition of appeal to the House of Lords from this order. In the meantime, by a decree of the Cour de Première Instance at Paris, dated the 21st of December, 1854, it was directed that the order

of the Lord Chancellor should be carried into execution, but that pending Mrs. Hope's appeal the children should be placed at a school in Paris, where both their father and mother should have liberty to see them. Mrs. Hope appealed against this order to the *Cour Impériale*; but before either appeal came on to be heard an arrangement was made between her and her husband for the settlement of all matters in dispute, and ultimately an agreement was drawn up in the French language, which was executed by Mrs. Hope at Paris, on the 20th of March, 1855, and by Mr. Hope in London on the 22d. The bill set out a translation of the agreement, which was in the following terms:—

“By a judgment delivered by the Civil Tribunal of the Seine, dated 27th December, 1854, it was declared that there should be executed in France a judgment of the Lord Chancellor of England, which ordered that Mrs. Hope should be bound to deliver up to Mr. Hope the two sons issue of their marriage, Messrs. Adrian Elias and Jean Henry Hope. Mrs. Hope has appealed against this order; but, for the purpose of putting an end to these painful proceedings, the following terms have been entered into by the parties: 1. Mrs. Hope will immediately deliver up to Mr. Hope Mr. Adrian Elias Hope; Mr. Jean Henry Hope will remain under the care of his mother. 2. Mrs. Hope will abandon her suit for a divorce instituted against Mr. Hope in the English courts, and for that purpose she binds herself to sign without delay all such deeds and documents as may be required. 3. Mrs. Hope undertakes not to oppose the suit for a divorce instituted against her by Mr. Hope in the English courts, but on the contrary to facilitate the obtaining such divorce. It is well understood that Mrs. Hope shall be able to see her children, to write to them, and to receive letters from them. 4. Mr. Hope agrees to pay in France to Mrs. Hope the annual sum of 75,000 francs in accordance with the decision of the Ecclesiastical Court, to be paid quarterly and in advance. 5. Mr. Hope undertakes to pay, firstly, the expenses incurred in England by Mrs. Hope, and secondly, Mrs. Hope's debts in France, but on condition that such debts shall not exceed the sum of 60,000 francs. These payments shall be made by the hands of Mr. Hope's agents. 6. With regard to any accounts that may be unsettled between Mr. and Mrs. Hope, as well as the handing over to her any articles that may belong to her, the parties agree to leave the matter to be settled by Messrs. Paillet & Duvergier, whose decision shall be final.”

In pursuance of this agreement the plaintiff brought Adrian Elias Hope to England and delivered him up to Mr. Hope, John Henry remaining with her at Paris, and she withdrew her appeals both in this country and in France. Mrs. Hope's suit in the Ecclesiastical Court and the responsive allegation of Mr. Hope were both dismissed.

The bill went on to allege that the plaintiff had in all respects performed her part of the agreement, but that the defendant had refused to perform his part of it; that he refused the plaintiff all access

to the children, though she had frequently desired to visit them, and that he had paid no part whatever of the promised annuity, of the costs incurred by the plaintiff, or of the sum on account of her debts. The bill prayed a specific performance of the agreement of March, 1855, that the plaintiff might have access to her children at all reasonable times, that an account might be taken of the arrears of the allowance stipulated for by the agreement, and that the defendant might be ordered to pay such arrears and to give security for future payments and to pay the cost of the suit.

The defendant demurred to this bill for want of equity, and the Master of the Rolls overruled the demurrer (22 Beav. 351). An appeal by the defendant came to be heard before the Lords Justices in July, 1856, and their Lordships having intimated an opinion that if the demurrer were allowed leave must be given to amend, it was arranged that the demurrer should be allowed without prejudice to any question and with leave to the plaintiff to amend her bill, and that if the defendant should demur again the demurrer should be brought directly before the Court of Appeal.

The bill accordingly was amended by introducing statements to the following effect: That the defendant resided in England, and that by his refusal to perform his part of the agreement the plaintiff was reduced to destitution — that if proceedings could be instituted in the courts of France the defendants would be decreed to pay the allowance and the other sums mentioned in the agreement. That it was the intention of both parties that the agreement should be valid and binding on both of them in England as well as in France, and that the plaintiff had acted on the faith of its being so binding. That by the French law regard would be had to the circumstances under which the agreement was entered into, and that it would be carried into effect by the French tribunals against the defendant if he were still a resident in that country, and that although Monsieur Paillet, one of the referees named in the agreement, had since died, the plaintiff was willing that it should be carried into execution in any manner which the court might direct. The defendant again demurred.¹

TURNER, L.J. This is a suit instituted by a wife against her husband for the specific performance of an agreement entered into between them. The bill has been met by a general demurrer for want of equity. In the course of the argument before us, my learned brother expressed our united opinion, that if the law of this country only was to be taken into consideration in determining the case, the agreement could not be supported, and the demurrer must consequently be allowed, and we stopped the reply upon that point. The further consideration which I have since given to the subject has confirmed me in that opinion.

¹ Arguments of counsel and the concurring opinion of KNIGHT BRUCE, L.J., are omitted. — Ed.

But it was argued for the plaintiff, in support of the bill, that in determining this case the law of France ought also to be taken into consideration, — that the agreement in question ought to be considered as an agreement entered into, or, at all events, to be performed in France, — that it is valid and capable of being enforced in France, and that effect ought therefore to be given to it by the law of this country, and upon these points we reserved our judgment.

Upon carefully examining the allegations of this bill, on which alone the case, being before us upon demurrer, must be decided, I think it far from clear that the bill alleges such a case as would in strictness warrant us in taking the law of France into consideration. But I should not feel satisfied to dispose of the case finally upon that ground, and I think it better, therefore, to consider it upon the assumption that the law of France is to be taken into account, and that the agreement in question would, according to that law, be capable of being enforced. Laying aside, then, the allegations of the bill which point to the introduction of the French law into the case, the bill alleges these facts: [His Lordship stated in order the substance of the allegations in the bill.]

No argument was addressed to us on the plaintiff's behalf with reference to that part of the bill which applies to the plaintiff's having access to her children, and seeks for relief in that respect. This part of the plaintiff's complaint, if well founded, is properly the subject of application in the suit in which the order for access has been made. That order having been made, the right given by it and the enforcement of that right cannot, as I apprehend, under any circumstances appearing upon this bill, properly be made the subject of a distinct suit, and the bill can derive no support from the introduction into it of this part of the case. The question is, whether, upon the assumption which I have stated as to the French law being taken into account, the bill can in other respects be maintained. I am of opinion that it cannot, and upon these grounds: I think that when the courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the courts of this country cannot, as I conceive, be called upon to enforce it. Now, there are two provisions of this agreement which, as it seems to me, are contrary to the law and policy of this country. By article 1 of the agreement one of the children is to remain under the care of the plaintiff, the mother. By article 3 of the agreement, Mrs. Hope, the plaintiff, undertakes "not to oppose the suit for a divorce instituted against her by Mr. Hope in the English courts, but, on the contrary, to facilitate the obtaining such divorce." Are these provisions consistent with our laws and policy?

The first of them is in contravention of the order of the Lord Chancellor stated in the bill. It is not only in contravention of that order, but, as I apprehend, is in contravention also of the settled law and policy of the country. The law of this country gives to the father the custody of the children and the control over them, and it gives him that custody and control not for his own gratification, but on account of his duties and with reference to the public welfare. Lord Eldon, speaking upon this subject in *Lord St. John v. Lady St. John*, 11 Ves. 531, says this: "Then how is it as to the children? The father has control over them by the law, as the law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with his wife, who cannot by law contract with him (and in this instance the contract as to the children is between the husband and wife only), it deserves great consideration, before a court of law should by *habeas corpus* upon a unilateral covenant, as the Scotch call it, take from him the custody and control of his children, thrown upon him by the law, not for his gratification, but on account of his duties, and place them, against his will, in the hands of his wife." And again, in *Lord Westmeath's Case*, Jac. 251, Lord Eldon, upon *habeas corpus*, ordered two children of very tender years to be delivered to their father, notwithstanding an express agreement on his part that they should reside with their mother and be educated under her care and superintendence. I know of no authority contravening the doctrine thus laid down and acted upon by Lord Eldon, and I have no doubt, therefore, that this first article of the agreement is repugnant both to the law and policy of this country. That there may be circumstances which would justify such an agreement as this article contains it is not necessary to deny. No such circumstances are alleged by this bill.

Then, as to the 3d article of the agreement. There is nothing which the courts of this country have watched with more anxious jealousy, and I will venture to say, with more reasonable jealousy, than contracts which have for their object the disturbance of the marital relations. The peace of families, the welfare of children, depends, to an extent almost immeasurable, upon the undisturbed continuance of those relations; and so strong is the policy of our law upon this subject, that not only is marriage indissoluble, except by the legislature, but divorces *à mensâ et thoro* are granted only in cases of cruelty or adultery. But what is this article of the agreement? That the wife shall not oppose the husband's suit for a divorce, but, on the contrary, shall facilitate the obtaining it. I can conceive nothing more contrary to the policy of our law than this provision of the agreement. It is, as it seems to me, repugnant to the law, both as to the object which it has in view and the means by which that object is to be effected. Its object is the discontinuance of the marital relations without, so far as appears by this bill, any sufficient cause for the purpose, for the bill states no more than that there was a suit by the plaintiff for a divorce

and evidence taken upon it, and that upon that evidence the responsive allegation, the purpose of which is not stated, was dismissed; and the means by which this object is to be effected are, as I understand this agreement, by evading the due administration of justice in the courts of this country. Much of the argument on the part of the plaintiff was, and most properly, addressed to this part of the case. It was said that the wife's assistance in obtaining the divorce could be of no avail, for that the Ecclesiastical Court would not in such cases act upon the consent of the parties; but there are other modes of rendering assistance than by consent, — modes, too, of which the court may have no cognizance. But then it was said that the whole of the evidence had been taken in the suit, and that there could, therefore, be no deception upon the court; but it is one thing to take evidence, another to dissect and scrutinize it and lay it before the court. It was further said on the part of the plaintiff, that the proposed divorce would amount to no more than a separation, and that the law of this country recognizes separations between husband and wife; but I am very far indeed from being satisfied that the law of this country would recognize a separation upon such an agreement as this between the husband and wife alone, and besides there are consequences which attach to a sentence of divorce which do not belong to a separation by agreement merely. Giving full weight, however, to all these arguments on the part of the plaintiff, they furnish no answer to the objection that this is an agreement for evading the due administration of justice in England.

Lastly, it was urged on the plaintiff's behalf, that whatever objection there may have been to this agreement in its inception, what remains to be performed is legal and unobjectionable; but to hold that an agreement so objectionable as that this court would not perform it, can be rendered capable of performance by the objectionable parts of it having been carried into execution, is a doctrine to which I cannot assent.

Upon these grounds, without entering more into the other points which were argued before us, my opinion is that this demurrer ought to be allowed.¹

¹ *Acc. Grell v. Levy*, 16 C. B. N. S. 7 (champertous agreement); *Rousillon v. Rousillon*, 14 Ch. D. 351 (contract in restraint of trade); *Rogers v. Raines*, (Ky.), 38 S. W. 483 (agreement to pay attorney's fee); *Rowland v. B. & L. Assoc.*, 115 N. C. 825, 18 S. E. 965 (unconscionable agreement). — *Ed.*

GREENWOOD v. CURTIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1810.

[Reported 6 Massachusetts, 358.]

PARSONS, C. J.¹ This action is assumpsit on a promissory note for the delivery of slaves, and the payment of bars, which are an African currency, and also on an *insimul computassent*. A verdict has been found for the plaintiff, upon a trial on the general issue, subject to the opinion of the court upon a case stated by the parties.

Two objections have been made to the verdict by the counsel for the defendant. That the letters of *Hippias* were improperly admitted in evidence; — and if they were not, that no action can be maintained in this State on a breach of either of the supposed promises.² . . .

The second objection, that no action upon either of the promises alleged can be maintained in this State, is principally relied on by the defendant. The argument of his counsel has been supported with much ingenuity. The slave trade, he has argued, is or has been prohibited by a statute of the Commonwealth, in the preamble of which it has been declared to be an unrighteous commerce; and he attempted to show that in itself it was immoral. This objection deserves much consideration.

By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this State; although such contract may not be valid by our laws, or even may be prohibited to our citizens. Thus in States where a greater rate of interest is allowed than by our statute, a contract securing a greater rate of interest, but agreeably to the law of the place, may be sued in our courts, where the plaintiff shall recover the stipulated interest.

This rule is subject to two exceptions. One is, when the Commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts. — Thus a contract for the sale and delivery of merchandise, in a State where such sale is not prohibited, may be sued in another State where such merchandise cannot be lawfully imported. But if the delivery was to be in a State where the importation was interdicted, there the contract could not be sued in the interdicting State; because the giving of legal effect to such a contract would be repugnant to its rights and interest. — Another exception is, when the giving of legal effect to the contract would exhibit to the citizens of the State an example pernicious and detestable. — Thus if a foreign State allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have

¹ SEDGWICK, J., prepared a dissenting opinion, for which see 6 Mass. 362 n. — ED.

² Only so much of the case as discusses the second objection is given. — ED.

any validity here. But marriages not naturally unlawful but prohibited by the law of one State and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States; such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract.— Another case may be stated, as within this second exception, in an action on a contract made in a foreign State by a prostitute, to recover the wages of her prostitution. This contract, if lawful where it was made, could not be the legal ground of an action here; for the consideration is confessedly immoral, and a judgment in support of it would be pernicious from its example. And perhaps all cases may be considered as within this second exception, which are founded on moral turpitude, in respect either of the consideration or the stipulation.

Before the present case can be compared with this rule, including the exception to it, the merits of it must be ascertained.

In South Carolina it was lawful to purchase slaves on the coast of Africa, and to import them as merchandise into that State. And it does not appear that this purchase and importation was unlawful at Rio Pongos. The original contract was made at Rio Pongos, for the purpose of obtaining slaves to transport to Charleston. The account was stated at Rio Pongos, in which the defendant acknowledged a balance due in cash, which was assented to by the plaintiff in Charleston. Whether either of the contracts is to be governed by the law of Rio Pongos or of South Carolina is immaterial: for in either case it does not appear that either of them was invalid *lege loci*. Either of them, therefore, may be the ground of an action in this State, unless it come within one of the exceptions to the rule, even if a contract of this nature made by the citizens of this State should be void. To maintain the action, if it be not within the exceptions, is enjoined on us by the comity we owe another State. And to entitle the defendant to retain in his hands the debt which he justly owes, as between the parties, he ought clearly to show some principle by which he may defend himself in dishonestly retaining this property.

We do not perceive any injury that could arise to the rights or interests of this State or its citizens, if either of the contracts had been faithfully executed agreeably to the terms of it. It was made abroad, by persons not citizens of the Commonwealth, and to be executed abroad, having no relation in its consequences to our laws.

The defendant therefore, to establish his defence, must bring this case within the second exception; and show that the action, as considered by the laws of this Commonwealth, is a *turpis causa*, furnishing a pernicious precedent, and so not to be countenanced. This upon public principles he is authorized to do, notwithstanding he is a party to all the moral turpitude of the contract.

The argument is, that the transportation of slaves from Africa is an immoral and vicious practice, and consequently that any contract to purchase slaves for that purpose is base and dishonest, and cannot be the foundation of an action here within the principle of comity adopted by the common law. This objection may apply to the counts on the note but not to the count on the *insimul computassent*.

Laying the counts on the note out of the case, we shall consider the objection of moral turpitude, so far as it affects the count on the *insimul computassent*: and we are satisfied that the objection does not apply to the contract averred in this count; there being nothing immoral in the consideration on the plaintiff's part, or in the stipulation made by the defendant.—If a Charleston merchant should send a cargo of merchandise to Africa, for the purpose of there selling it, and with the proceeds to purchase slaves; and if the cargo be accordingly sold, and the purchaser agree to pay for it in slaves; and he afterwards shall refuse or neglect to deliver the slaves, but makes a new agreement with the owner to pay him a sum of money for his cargo, an action can unquestionably in our opinion be maintained on this new contract; and the illegal contract, being annulled or void, cannot affect it.—So, if the purchaser had delivered a part only of the slaves to the merchant, and afterwards agrees with him to pay the balance in cash, we see no objection to an action to recover this balance in cash, if the purchaser refuse to pay it.

In the present case the defendant having delivered a part only of the slaves, and having become a creditor of the plaintiff for supplies furnished to his use, states his account, in which after deducting the slaves delivered and the supplies furnished, he acknowledges a balance in cash, and the plaintiff, having assented to the account, demands the balance in this action we see no legal objection to his recovery. The consideration of the implied promise arising from this settlement is the sale of the cargo, which involves in it no moral turpitude; neither is the performance of the promise by paying the balance in cash immoral. And although on the same day the defendant, in consideration of this balance due in cash, promises by his note to discharge it principally in slaves, and the small remainder in cash; yet this promise is no bar to an action by the plaintiff on the account, even if the promise by the note is here considered as legal and *a fortiori* if it is considered as void for its immorality.—It is true if the defendant voluntarily discharged the note, the balance of the account could not afterwards be recovered, for the consideration of it was discharged by the payment of the note: nor could the payment of the note be recovered back, for *potior est conditio possidentis*.

In this case the defendant having acknowledged a balance of cash in his hands, the property of the plaintiff; although it came into his hands from the sale of the merchandise, for which he was to

pay in slaves, but did not, this balance as between the parties is justly due the plaintiff; and unless the principles of public policy against the action upon the *insimul computassent* are manifest, we cannot decide that the defendant shall not be held to pay what he justly owes.

In this view of the case we are satisfied that the action is maintained on the *insimul computassent*, and that the plaintiff may take his verdict on that count, and have judgment entered upon it.

*Judgment according to verdict.*¹

FONSECA v. CUNARD STEAMSHIP CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 153 Massachusetts, 553.]

THE plaintiff took passage on the defendant's steamer from Liverpool to Boston. He had with him on the ship his trunk, containing articles of clothing and personal property reasonable and proper for an ocean traveller to carry as personal baggage, all of which were entirely ruined on the voyage by the negligence of the defendant. When the plaintiff engaged his passage in London, he received a passage ticket from the defendant's agent there. This ticket consisted of a sheet of paper of large quarto size, the face and back of which were covered with written and printed matter. Upon the back, among other printed matter, was the following: "The company is not liable for loss of or injury to the passenger or his luggage, or delay in the voyage, whether arising from the act of God, the Queen's enemies, perils of the sea, rivers, or navigation, restraint of princes, rulers, and peoples, barratry, or negligence of the company's servants (whether on board the steamer or not), defect in the steamer, her machinery, gear, or fittings, or from any other cause of whatsoever nature."

The judge, upon these facts, found and ruled "that the contract was a British contract; that, by the English law, a carrier may by contract exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff. This has been decided in Massachusetts to be a question of evidence, in which the *lex fori* is to govern; that although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping receipt which he takes without dissent, yet a passenger ticket, even though it be called a 'contract ticket,' does not stand on the same footing, that in this case assent is not a conclu-

¹ *Acc. Roundtree v. Baker*, 52 Ill. 241. — Ed.

sion of law, and is not proved as a matter of fact." Upon the whole case, the judge ruled that the defendant company was not exempted from liability by the contract ticket, and found for the plaintiff.

If the rulings were wrong, the verdict was to be set aside, and judgment entered for the defendant; otherwise, the judgment was to be entered on the finding.¹

KNOWLTON, J. . . . We are of opinion that the ticket delivered to plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he assented to its provisions. All these provisions are equally binding on him as if he had read them.

The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy. *Greenwood v. Curtis*, 6 Mass. 358; *Forepaugh v. Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217, and cases cited; *In re Missouri Steamship Co.*, 42 Ch. D. 821, 326, 327; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

*Judgment for the defendant.*²

THE KENSINGTON.

SUPREME COURT OF THE UNITED STATES. 1902.

[*Reported 183 United States, 263.*]

WHITE, J.³ The libel by which this action was commenced sought to recover the value of passengers' baggage which it was alleged the ship had wrongfully failed to deliver. The facts essential to be borne in mind, in order to approach the questions arising for decision, are as follows:—

The International Navigation Company, a New Jersey corporation, on December 6, 1897, at the office of its Paris agency, issued to Mrs. and Miss Bleecker, the wife and daughter of an officer of the United States Navy, a steamer ticket for a voyage from Antwerp to New York on the Kensington, a steamer in the control of the company, advertised to sail from Antwerp on December the 11th. The ticket was delivered to Mrs. Bleecker, who at the time made part payment of the passage money. The baggage of the two passengers was shipped by rail to Antwerp, to the care of the agent of the company there.

¹ The statement of facts has been condensed, and part of the opinion omitted. — Ed.

² *Acc. Forepaugh v. Del. L. & W. R. R.*, 128 Pa. 217, printed *ante* Vol. I. p. 181. — Ed.

³ Part of the opinion is omitted. — Ed.

Mrs. Bleecker, at Antwerp, on the 10th of December, paid the remainder of the passage money, and it was entered on the ticket. The baggage having in the meanwhile been received, the charges which the agent at Antwerp had advanced were refunded and a receipt was issued. It was stated therein that the value of the baggage was unknown, and that it was shipped subject to the conditions contained in the company's steamer ticket and bill of lading. Mrs. Bleecker and her daughter embarked, and the steamer sailed on the 11th of December. The ticket was subsequently taken up by the purser.

The baggage was stowed in what was known as number 2, upper steerage deck. The voyage was an exceptionally rough one, the ship, encountering heavy seas and winds, rolled from 38 to 45 degrees on either side during the height of the gale, and was obliged to heave to for about fifteen hours. On arrival at New York the baggage was found to be totally destroyed. By constant shifting it had been reduced to an almost unrecognizable mass, was commingled with débris of broken china and straw, and covered with water. The first was occasioned by stowing crates of china in the same compartment. The presence of the water was explained by the fact that an exhaust pipe which passed through the compartment had been broken by the shifting of the contents of the compartment, and hence the exhaust escaped into the compartment.

There is no possible view which can be taken of the facts by which the loss of the baggage was brought about, by which the ship could be held responsible if the steamer ticket was in and of itself a complete contract, and all the conditions or exceptions legibly printed on the face thereof were lawful. The ticket was signed by the agent of the company at Paris, was countersigned by the agent at Antwerp, but was not signed by either Mrs. Bleecker or her daughter. One of the conditions printed on the ticket provided that there should be no liability to each passenger, "under any circumstances," beyond the sum of 250 francs, "at which such baggage is hereby valued," unless an increased value be declared and an additional sum paid as provided by the condition.

There was no proof tending to show that at the time the ticket was issued the attention of Mrs. Bleecker or her daughter was called to the fact that it embodied exceptional stipulations relieving the company from liability, or that such conditions were agreed to, except in so far as a meeting of minds on the subject may be inferred from the fact of the delivery of the ticket by the company, and its acceptance, and that it contained on its face, in small but legible type, among others, the stipulations which are relied upon. The testimony of Mrs. Bleecker and her daughter was that when the ticket was received it was put aside without reading it, and that it was not subsequently examined before it was delivered to the ship's officer. The District Court held that the loss of the baggage was attributable to bad stowage; that the ticket and the conditions printed on it were a contract binding upon

the parties, so far as the conditions were lawful. The conditions generally relieving from liability for negligence were held to be void, but the stipulation as to the value of the baggage was held valid; recovery was allowed only for the equivalent of 250 francs to each. 88 Fed. 331.

On appeal the Circuit Court of Appeals for the Second Circuit affirmed the judgment. 36 C. C. A. 533, 94 Fed. 885.

The case by the allowance of a writ of certiorari is here for review.

The District Court held, although the condition of the weather might account for the shifting of the baggage, that result could also have arisen from its bad stowage; and, in the absence of all proof by the ship that the baggage had been properly stowed, when such proof was peculiarly within its reach, the loss must be presumed to have arisen from the imperfect stowage. The Circuit Court of Appeals, while in effect agreeing to this conclusion, in addition found that there was proof in the record tending to sustain the conclusion that the baggage had been improperly stowed, and that no proof even tending to rebut this testimony had been offered by the company. As in the argument at bar the conclusion of the court below on this subject was not seriously questioned, we content ourselves with saying that, as a matter of fact, we find them to be sustained, and therefore pass from their further consideration.

The loss of the baggage being, then, attributable to improper stowage, the question is, Was the vessel relieved from the consequence of its fault by the exceptions contained in the passenger ticket? The District Court decided "that a ticket of the character above described for a transatlantic passage is a unilateral contract, and, like a bill of lading, is binding upon the person who receives it, so far as its provisions are reasonable and valid." In other words, the court held, although there was no proof of the meeting of the minds of the parties upon the subject of exceptional limitations to be imposed upon the contract of carriage, the receipt and retention of the ticket implied a unilateral contract embracing the exceptions found in legible characters on the face of the ticket. And being thus a part of the express and written contract, the exceptions would be enforced, provided they were just and reasonable. The Circuit Court of Appeals in effect approved these views of the District Court.

While, apparently, the question whether there was a unilateral contract necessarily arises first for consideration, such is not the case when the situation of the record is taken into view. For should we, in disposing of this question, determine that the rulings of the court below as to the unilateral contract were correct, we would not thereby be relieved from deciding whether the conditions embodied in the contract were valid. On the other hand, should we conclude that the conditions relied on were void, there will be no occasion to determine the question of contract. We hence invert the logical order of consideration, and first come to determine whether the

conditions enumerated in the ticket relieved from the responsibility otherwise resulting from the bad stowage of the baggage. In doing so we shall, of course, assume, for the purpose of this branch of the case only, that the conditions relied upon were a part of a unilateral contract, and were binding as far as they were just and reasonable. It is apparent if the carrier, in transporting the baggage, was governed by the act of February 13, 1893, designated as the Harter Act, any provision in the ticket exempting from liability for fault in loading or stowage was void because inhibited by the express provisions of the statute. 27 Stat. at L. 445, chap. 105. As, however, the view which we take of the conditions expressed in the ticket will be equally decisive, whether or not the Harter Act concerns the carriage of passengers and their baggage, it becomes unnecessary to intimate any opinion as to whether the provisions of the act in question apply to such contracts. The exceptions found on the face of the ticket upon which the carrier depends are as follows:—

“(c) The shipowner or agent are not under any circumstances liable for loss, death, injury, or delay to the passenger or his baggage arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the seas, rivers, or navigation, accidents to or of machinery, boilers, or steam, collisions, strikes, arrest, or restraint of princes, courts of law, rulers, or people, or from any act, neglect, or default of the shipowner's servants, whether on board the steamer or not, or on board any other vessel belonging to the shipowner, either in matters aforesaid or otherwise howsoever. Neither the shipowner nor the agent is under any circumstances, or for any cause whatever or however arising, liable to an amount exceeding 250 francs for death, injury, or delay of or to any passenger carried under this ticket. The shipowner will use all reasonable means to send the steamer to sea in a seaworthy state and well-found, but does not warrant her seaworthiness.

“(d) The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket, beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of 1 per cent, or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading, in use from the port of departure.”

It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of the *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 507,

and *Knott v. Botany Worsted Mills*, 179 U. S. 69, 71; where the previously adjudged cases are referred to, and the principles by them expounded are restated.

True it is that by the act of February 13, 1893 (27 Stat. at L. 445, chap. 105), known as the Harter Act, already adverted to, the general rule just above stated was modified so as to exempt vessels, when engaged in the classes of carriage coming within the terms of the statute, from liability for negligence in certain particulars. But while this statute changed the general rule in cases which the act embraced, it left such rule in all other cases unimpaired. Indeed, in view of the well-settled nature of the general rule at the time the statute was adopted, it must result that legislative approval was by clear implication given to the general rule as then existing in all cases where it was not changed.

Testing the exemptions found in the ticket by the rule of public policy, it is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or his servants. And seeking to accomplish these results, it is equally plain that the conditions were void if their legality be considered solely with reference to the modifications of the general rule created by the act of 1893. *Knott v. Botany Worsted Mills*, 179 U. S. 69. As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that "all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made," it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. Story, Conf. L. §§ 38, 244. While, as said in *Knott v. Botany Worsted Mills*, the previous decisions of this court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this court. In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, the question arose whether conditions exempting a carrier from responsibility for loss caused by the neglect of himself or his servants could be

enforced in the courts of the United States, the bill of lading having been issued in New York by a British ship for goods consigned to England. Despite the fact that conditions exempting from responsibility for loss arising from negligence were valid by the laws of New York, and would have been upheld in the courts of that State, it was decided that, in view of the rule of public policy applied by the courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the States of the Union. Nor is the suggestion that because there is no statute expressly prohibiting such contracts, and because it is assumed no offence against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion. The precise question has been carefully considered and decided in the district courts of the United States. In *The Guildhall*, 58 Fed. 796, it was held that a stipulation in a bill of lading issued at Rotterdam on goods destined to New York, exempting the carrier from liability for negligence, would not be enforced in the courts of the United States, although such a condition was valid under the law of Holland. In *The Glenmavis*, 69 Fed. 472, the same rule was applied to a bill of lading issued in Germany by a British ship, for goods consigned to Philadelphia. Indeed, by implication the question is controlled by statute. We have previously pointed out, under the assumption that the Harter Act does not apply to the carriage of the baggage of a passenger, that such law in effect affirms the rule of public policy as previously existing in the cases, where no change was made. But that act expressly prohibits carriers engaged in the business which it regulates from contracting, even in a foreign country, for a shipment to the United States, to relieve themselves from negligence in cases where the statute does not do so. *Knott v. Botany Worsted Mills*, 179 U. S. 69. The theory, then, by which alone the conditions relied on in this case can be enforced, despite the public policy which governs, in the courts of the United States, reduces itself to this: Carriers who transact a class of business where they are exempt by law, in many cases, from the consequences of the neglect of themselves or their servants, may not overthrow public policy by contracts made in a foreign country for a shipment to the United States; but carriers who are in no case exempt by the law from the consequence of their neglect may do so. But this amounts in last analysis to this: The lesser the immunity from negligence the greater the power to avoid the consequences of negligence.

The general exemptions from responsibility for negligence which the ticket embodies being controlled by the rule enforced in the courts of

the United States, and being therefore void, because against public policy, we come to consider the particular provisions contained in the ticket with reference to the value of the baggage and the limit of recovery, if any, arising therefrom. . . .

In view of the nature and duration of the voyage, of the circumstances which may be reasonably deemed to environ transatlantic cabin passengers, and the objects and purposes which it may also be justly assumed the persons who undertake such a voyage have in view, we think the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment, was void. It is therefore unnecessary to decide whether the ticket delivered and received under circumstances disclosed by the record gave rise to a contract embracing the exceptions to the carrier's liability which were stated on the ticket. We intimate no opinion on the subject.

The decree below must be reversed, and the cause remanded to the District Court, with directions to ascertain the actual damage sustained by the libellants, and to enter a decree in their favor for the amount of such damages, with interest and costs.

And it is so ordered.

EMERY v. BURBANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1895.

[Reported 163 Massachusetts, 326.]

HOLMES, J. This is an action on an oral agreement, alleged to have been made in Maine, in 1890, by the defendant's testatrix, Mrs. Rumery, to the effect that, if the plaintiff would leave Maine and take care of Mrs. Rumery, the latter would leave the plaintiff all her property at her death, and also would put four thousand dollars into a house which the plaintiff should have. At the trial evidence was introduced tending to prove the agreement as alleged. The presiding justice ruled that the action could not be maintained, and the case is here on exceptions. As we are of opinion that the ruling must be sustained under St. 1888, c. 372, requiring agreements to make wills to be in writing, a fuller statement of the facts is not needful.

There is no doubt of the general principles to be applied. A contract valid where it is made is valid everywhere, but it is not necessarily enforceable everywhere. It may be contrary to the policy of the law of the forum. *Van Reimsdyk v. Kane*, 1 Gall. 371, 375; *Greenwood v. Curtis*, 6 Mass. 358; *Fant v. Miller*, 17 Grat. 47, 62. Or again, if the law of the forum requires a certain mode of proof, the contract, although valid, cannot be enforced in that jurisdiction without the proof required there. This is as true between the States of this

Union as it is between Massachusetts and England. *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 306; *Pritchard v. Norton*, 106 U. S. 124, 134; *Downer v. Chesebrough*, 36 Conn. 39; *Kleeman v. Collins*, 9 Bush (Ky.), 460; *Fant v. Miller*, 17 Grat. 47; *Hunt v. Jones*, 12 R. I. 262, 266; *Yates v. Thomson*, 3 Cl. & Fin. 544, 586, 587; *Bain v. Whitehaven & Furness Junction Railway*, 3 H. L. Cas. 1, 19; *Leroux v. Brown*, 12 C. B. 801. When the law involved is a statute, it is a question of construction whether the law is addressed to the necessary constituent elements, or legality, of the contract on the one hand, or to the evidence by which it shall be proved on the other. In the former case, the law affects contracts made within the jurisdiction, wherever sued, and may affect only them. *Drew v. Smith*, 59 Me. 393. In the latter, it applies to all suits within the jurisdiction, wherever the contracts sued upon were made, and again may have no other effect. It is possible, however, that a statute should affect both validity and remedy by express words, and this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other. For instance, in a well-known English case *Maule, J.* said, "The fourth section of the statute of frauds entirely applies to procedure." And on this ground it was held that an action could not be maintained upon an oral contract made in France. But he went on, "It may be that the words used, operating on contracts made in England, renders them void." *Leroux v. Brown*, 12 C. B. 801, 805, 807. We cite the language, not for its particular application, but as a recognition of the possibility which we assert.

The words of the statute before us seem in the first place, and most plainly, to deal with the validity and form of the contract. "No agreement . . . shall be binding, unless such agreement is in writing." If taken literally, they are not satisfied by a written memorandum of the contract; the contract itself must be made in writing. They are limited, too, to agreements made after the passage of the act, a limitation which perhaps would be more likely to be inserted in a law concerning the form of a contract than in one which only changed a rule of evidence. But we are of opinion that the statute ought not to be limited to its operation on the form of contracts made in this State. The generality of the words alone, "no agreement," is not conclusive. But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practised without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts testators should be sued here upon such contracts without written evidence, wherever they are made.

If we are right in our understanding of the policy established by the legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles. "If oral evidence

were offered which the *lex fori* excluded, such exclusion, being founded on the desire of preventing perjury, might claim to override any contrary rule of the *lex loci contractus*, not only on the ground of its being a question of procedure, but also because of that reservation in favor of any stringent domestic policy which controls all maxims of private international law." Westlake, *Priv. Int. Law* (3d. ed.), § 208; Wharton, *Conf. Laws* (2d. ed.), § 766.

In our view, the statute, whatever it expresses, implies a rule of procedure broad enough to cover this case. It is not necessary to decide exactly how broad the rule may be, — whether, for instance, if, by some unusual chance, a suit should happen to be brought here against an ancillary administrator upon a contract made in another State by one of its inhabitants, the contract would have to be in writing. The rule extends at least to contracts by Massachusetts testators. It might be possible to treat the words, "signed by the party whose executor or administrator is sought to be charged," as meaning "signed by the party whose executor or administrator is sought to be charged in Massachusetts," and to construe the whole statute as directed only to procedure. Compare *Fant v. Miller*, 17 Grat. 47, 72 *et seq.*; *Denny v. Williams*, 5 Allen, 1, 3, 9. Upon this question also we express no opinion. All that we decide is that the statute does apply to a case like the present.

The law of the testator's domicile is the law of the will. A contract to make a will means an effectual will, and therefore a will good by the law of the domicile. In a sense, the place of performance, as well as the forum for a suit in case of breach, is the domicile. We do not draw the conclusion that therefore the validity of all such contracts, wherever sued on, must depend on the law of the domicile. That would leave many such contracts in a state of indeterminate validity, until the testator's death, as he may change his domicile so long as he can travel. But the consideration shows that the final domicile is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly. There would be no question to be argued if the law were in terms a rule of evidence. It is equally open for a State to declare, upon the same considerations which dictate a rule of evidence, that a contract must have certain form if it is to be enforced against its inhabitants in its courts. Legislation of this kind for contracts which thus necessarily reach into the jurisdiction in their operation hardly goes as far as statutes dealing with substantive liability which have been upheld. *Commonwealth v. Macloon*, 101 Mass. 1.

If the statute applies, the fact that the plaintiff has furnished the stipulated consideration will not prevent its application.

Exceptions overruled.

POLSON v. STEWART.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1897.

[Reported 167 *Massachusetts*, 211.]

HOLMES, J. This is a bill to enforce a covenant made by the defendant to his wife, the plaintiff's intestate, in North Carolina, to surrender all his marital rights in certain land of hers. The land is in Massachusetts. The parties to the covenant were domiciled in North Carolina. According to the bill, the wife took steps which under the North Carolina statutes gave her the right to contract as a *feme sole* with her husband as well as with others, and afterwards released her dower in the defendant's lands. In consideration of this release, and to induce his wife to forbear suing for divorce, for which she had just cause, and for other adequate considerations, the defendant executed the covenant. The defendant demurs.

The argument in support of the demurrer goes a little further than is open on the allegations of the bill. It suggests that the instrument which made the wife a "free trader," in the language of the statute, did not go into effect until after the execution of the release of dower and of the defendant's covenant. But the allegation is that the last mentioned two deeds were executed after the wife became a free trader, as they probably were in fact, notwithstanding their bearing date earlier than the registration of the free trader instrument. We must assume that at the date of their dealings together the defendant and his wife had as large a freedom to contract together as the laws of their domicile could give them.

But it is said that the laws of the parties' domicile could not authorize a contract between them as to lands in Massachusetts. Obviously this is not true. It is true that the laws of other States cannot render valid conveyances of property within our borders which our laws say

are void, for the plain reason that we have exclusive power over the *res*. *Ross v. Ross*, 129 Mass. 243, 246; *Hallgarten v. Oldham*, 135 Mass. 1, 7, 8. But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract. Such precedents as there are, are on the same side. The most important intimations to the contrary which we have seen are a brief note in Story, *Conf. of Laws*, § 436, note, and the doubts expressed in Mr. Dicey's very able and valuable book. Lord Cottenham stated and enforced the rule in the clearest way in *Ex parte Pollard*, 4 Deac. 27, 40 *et seq.*; *s. c.* Mont. & Ch. 239, 250. So Lord Romilly in *Cood v. Cood*, 33 Beav. 314, 322. So in Scotland, in a case like the present, where the contract enforced was the wife's. *Findlater v. Seafeld*, Faculty Decisions, 553, Feb. 8, 1814. See also *Cuninghame v. Semple*, 11 Morison, 4462; *Erskine*, Inst. Bk. 3, tit. 2, § 40; *Westlake*, Priv. Int. Law (3d ed.), § 172; *Rorer*, Interstate Law (2d ed.), 289, 290.

If valid by the law of North Carolina there is no reason why the contract should not be enforced here. The general principle is familiar. Without considering the argument addressed to us that such a contract would have been good in equity if made here (*Holmes v. Winchester*, 133 Mass. 140; *Jones v. Clifton*, 101 U. S. 225; and *Bean v. Patterson*, 122 U. S. 496, 499), we see no ground of policy for an exception. The statutory limits which have been found to the power of a wife to release dower (*Mason v. Mason*, 140 Mass. 63, and *Peaslee v. Peaslee*, 147 Mass. 171, 181) do not prevent a husband from making a valid covenant that he will not claim marital rights with any person competent to receive a covenant from him. *Charles v. Charles*, 8 Grat. 486; *Logan v. Birkett*, 1 Myl. & K. 220; *Marshall v. Beall*, 6 How. 70. The competency of the wife to receive the covenant is established by the law of her domicile and of the place of the contract. The laws of Massachusetts do not make it impossible for him specifically to perform his undertaking. He can give a release which will be good by Massachusetts law. If it be said that the rights of the administrator are only derivative from the wife, we agree, and we do not for a moment regard any one as privy to the contract except as representing the wife. But if then it be asked whether she could have enforced the contract during her life, an answer in the affirmative is made easy by considering exactly what the defendant undertook to do. So far as occurs to us, he undertook three things: first, not to disturb his wife's enjoyment while she kept her property; secondly, to execute whatever instrument was necessary in order to release his rights if she conveyed; and thirdly, to claim no

rights on her death, but to do whatever was necessary to clear the title from such rights then. All these things were as capable of performance in Massachusetts as they would have been in North Carolina. Indeed, all the purposes of the covenant could have been secured at once in the lifetime of the wife by a joint conveyance of the property to a trustee upon trusts properly limited. It will be seen that the case does not raise the question as to what the common law and the presumed law of North Carolina would be as to a North Carolina contract calling for acts in Massachusetts, or concerning property in Massachusetts, which could not be done consistently with Massachusetts law.

With regard to the construction of the defendant's covenant we have no doubt. It is "to surrender, convey, and transfer to said Kitty T. Polson Stewart, Jr., and her heirs, all the rights of him, the said Henry Stewart, Jr., in and to the lands and property above described, which he may have acquired by reason of the aforesaid marriage, and the said Kitty T. Polson Stewart, Jr., is to have the full and absolute control and possession of all of said property free and discharged of all the rights, claims, or demands of every nature whatsoever of the said Henry Stewart, Jr." Notwithstanding the decision of the majority in *Rochon v. Lecatt*, 2 Stew. (Ala.) 429, we think that it would be quibbling with the manifest intent to put an end to all claims of the defendant if we were to distinguish between vested rights which had and those which had not yet become estates in the land, or between claims during the life of the wife and claims after her death. It is plain, too, that the words import a covenant for such further assurance as may be necessary to carry out the manifest object of the deed. See *Marshall v. Beall*, 6 How. 70; *Ward v. Thompson*, 6 Gill & Johns. 849; *Hutchins v. Dixon*, 11 Md. 29; *Hamrico v. Laird*, 10 Yerger, 222; *Mason v. Deese*, 30 Ga. 308; *McLeod v. Board*, 30 Tex. 238.

Objections are urged against the consideration. The instrument is alleged to have been a covenant. It is set forth, and mentions one dollar as the consideration. But the bill alleges others, to which we have referred. It is argued that one of them, forbearance to bring a well-founded suit for divorce, was illegal. The judgment of the majority in *Merrill v. Peaslee*, 146 Mass. 460, 463, expressly guarded itself against sanctioning such a notion, and decisions of the greatest weight referred to in that case show that such a consideration is both sufficient and legal. *Newsome v. Newsome*, L. R. 2 P. & D. 306, 312; *Wilson v. Wilson*, 1 H. L. Cas. 538, 574; *Besant v. Wood*, 12 Ch. D. 605, 622; *Hart v. Hart*, 18 Ch. D. 670, 685; *Adams v. Adams*, 91 N. Y. 381; *Sterling v. Sterling*, 12 Ga. 201. Then it is said that the wife's agreement in bar of her dower was invalid, because it had not the certificate that she had been examined, etc., as required by the North Carolina statutes annexed to the bill. Whether it was invalid or not, the defendant was content with it, and accepted the

execution of it as a consideration. This being so, it would be hard to say that it was not one, even if without legal effect. Whether void or not, it is alleged to have been performed; and finally, if it was void, it was void on its face, as matter of law, and the husband must be taken to have known it, so that the most that could be done would be to disregard it; if that were done, the other considerations would be sufficient. See *Jones v. Waite*, 5 Bing. N. C. 341, 351.

Demurrer overruled.

FIELD, C. J. I cannot assent to the opinion of a majority of the court. By our law husband and wife are under a general disability or incapacity to make contracts with each other. The decision in *Whitney v. Closson*, 138 Mass. 49, shows, I think, that the contract sued on would not be enforced if the husband and wife had been domiciled in Massachusetts when it was made. As a conveyance made directly between husband and wife of an interest in Massachusetts land would be void although the parties were domiciled in North Carolina when it was made, and by the laws of North Carolina were authorized to make such a conveyance, so I think that a contract for such a conveyance between the same persons also would be void. It seems to me illogical to say that we will not permit a conveyance of Massachusetts land directly between husband and wife, wherever they may have their domicile, and yet say that they may make a contract to convey such land from one to the other which our courts will specifically enforce. It is possible to abandon the rule of *lex rei sitæ*, but to keep it for conveyances of land and to abandon it for contracts to convey land seems to me unwarrantable.

The question of the validity of a mortgage of land in this Commonwealth is to be decided by the law here, although the mortgage was executed elsewhere where the parties resided, and would have been void if upon land there situated. *Goddard v. Sawyer*, 9 Allen, 78. "It is a settled principle, that 'the title to, and the disposition of, real estate must be exclusively regulated by the law of the place in which it is situated.'" *Cutter v. Davenport*, 1 Pick. 81; *Osborn v. Adams*, 18 Pick. 245. The testamentary execution of a power of appointment given by will in relation to land is governed by the *lex situs*, or the law of the domicile of the donor of the power. *Sewall v. Wilmer*, 132 Mass. 131.

The plaintiff, merely as administrator, cannot maintain the bill. *Caverly v. Simpson*, 132 Mass. 462, 464. The plaintiff must proceed on the ground that Mrs. Henry Stewart, Jr., acquired by the instruments executed in North Carolina the right to have conveyed or released to her and her heirs by her husband all the interest he had as her husband in her lands in Massachusetts; that this right descended on her death to her heirs, according to the law of Massachusetts; and that the plaintiff, being an heir, has acquired the interest of the other heirs, and therefore brings the bill as owner of

this right. The plaintiff, as heir, claims by descent from Mrs. Stewart, and if the contract sued on is void as to her, it is void as to him.

It is only on the ground that the contract conveyed an equitable title that the plaintiff as heir has any standing in court. His counsel founds his argument on the distinction between a conveyance of the legal title to land and a contract to convey it. If the instrument relied on purported to convey the legal title, his counsel in effect admits that it would be void by our law. He accepts the doctrine stated in *Ross v. Ross*, 129 Mass. 243, 246, as follows: "And the validity of any transfer of real estate by act of the owner, whether *inter vivos* or by will, is to be determined, even as regards the capacity of the grantor or testator, by the law of the State in which the land is situated." As a contract purporting to convey a right in equity to obtain the legal title to land, he contends that it is valid. I do not dispute the cases cited with reference to contracts concerning personal property, but the rule at common law in regard to the capacity of parties to make contracts concerning real property, as I read the cases and text-books, is that the *lex situs* governs. *Cochran v. Benton*, 126 Ind. 58; *Doyle v. McGuire*, 38 Ia. 410; *Sell v. Miller*, 11 Ohio St. 331; *Johnston v. Gawtry*, 11 Mo. App. 322; *Frierson v. Williams*, 57 Miss. 451.

Dicey on the Conflict of Laws is the latest text-book on the subject. He states the rule as follows:—

Page lxxxix. "(B). Validity of Contract. (i) Capacity.

"Rule 146. Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract.

"(1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid.

"(2) If he has not such capacity by that law, the contract is invalid.

"Exception 1. A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loci contractus*) [?].

"Exception 2. A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs*."

Page xcii. "(A). Contracts with regard to Immovables.

"Rule 151. The effect of a contract with regard to an immovable is governed by the proper law of the contract [?].

"The proper law of such contract is, in general, the law of the country where the immovable is situate (*lex situs*)."

On page 517 *et seq.* he states the law in the same way, with numerous illustrations, but with some hesitation as to the law governing the form of contracts to convey immovables. See page xc., Rule 147, Exception 1. For American notes with cases, see page 527 *et seq.* In the Appendix, page 769, note (B), he discusses the subject at length, and with the same result. Some of the cases cited are the

following: Succession of Larendon, 39 La. An. 952; Besse v. Pellochoux, 73 Ill. 285; Fuss v. Fuss, 24 Wis. 256; Moore v. Church, 70 Ia. 208; Heine v. Mechanics & Traders Ins. Co. 45 La. An. 770; First National Bank of Attleboro v. Hughes, 10 Mo. App. 7; Ordronaux v. Rey, 2 Sandf. Ch. 33; Adams v. Clutterbuck, 10 Q. B. D. 403; Chapman v. Robertson, 6 Paige, 627, 630.

Phillimore in 4 Int. Law (8d ed.), 596, states the law as follows: —

“DCCXXXV. 1. The case of a contract respecting the *transfer* of immovable property illustrates the variety of the rules which the foreign writers upon private international law consider applicable to a contract to which a foreigner is a party: they say that,

“i. The capacity of the obligor to enter into the contract is determined by reference to the law of his domicile.

“ii. The like capacity of the obligee by the law of *his* domicile.

“iii. The mode of alienation or acquisition of the immovable property is to be governed by the law of the situation of that property.

“iv. The external form of the contract is to be governed by the law of the place in which the contract is made.

“It is even suggested by Fœlix, that sometimes the *interpretation* of the contract may require the application of a fifth law.

“DCCXXXVI. The Law of England, and the Law of the North American United States, require the application of the *lex rei sitæ* to all the four predicaments mentioned in the last section.

“DCCXXXVII. But a distinction is to be taken between contracts to transfer property and the contracts by which it is transferred. The former are valid if executed according to the *lex loci contractus*; the latter require for their validity a compliance with the forms prescribed by the *lex rei sitæ*. Without this compliance the *dominium* in the property will not pass.”

To the same effect as to the capacity of the parties are Rattigan, Priv. Int. Law, 128; Whart. Conf. of Laws (2d ed.), § 296; Story, Conf. of Laws (8th ed.), §§ 424–431, 435; Rorer, Interstate Law, 263; Nelson, Priv. Int. Law, 147, 260. See Westlake, Priv. Int. Law (3d ed.), §§ 156, 167 *et seq.*

On reason and authority I think it cannot be held that, although a deed between a husband and his wife, domiciled in North Carolina, of the rights of each in the lands of the other in Massachusetts, is void as a conveyance by reason of the incapacity of the parties under the law of Massachusetts to make and receive such a conveyance to and from each other, yet, if there are covenants in the deed to make a good title, the covenants can be specifically enforced by our courts, and a conveyance compelled, which, if voluntarily made between the parties, would be void.

I doubt if all of the instruments relied on have been executed in accordance with the statutes of North Carolina. By section 1828 of the statutes of that State set out in the papers, the wife became a free trader from the time of registration. This I understand is January

7, 1893. Exhibit B purports to have been executed before that time, to wit, January 4, 1893. There does not appear to have been any examination of the wife separate and apart from her husband, as required by section 1835. If Exhibit B fails, there is at least a partial failure of consideration for Exhibit C. It is said that an additional consideration is alleged, viz. the wife's forbearing to bring a suit for divorce. Whether this last is a sufficient consideration for a contract I do not consider. It is plain enough that there was an attempt on the part of the husband and wife to continue to live separate and apart from each other without divorce, and to release to each other all the property rights each had in the property of the other. If the release of one fails, I think that this court should not specifically enforce the release of the other; mutuality in this respect is of the essence of the transaction. If the husband owned lands in Massachusetts, and had died before his wife, I do not think that Exhibit B, even if it were executed according to the statutes of North Carolina, and the wife duly examined and a certificate thereof duly made, would bar her of her dower. Our statutes provide how dower may be barred. Pub. Sts. c. 124, §§ 6-9. Exhibit B is not within the statute. See *Mason v. Mason*, 140 Mass. 63. Antenuptial contracts have been enforced here in equity so as to operate as a bar of dower, even if they did not constitute a legal bar. *Jenkins v. Holt*, 109 Mass. 261. But postnuptial contracts, so far as I am aware, never have been enforced here so as to bar dower, unless they conform to the statutes. *Whitney v. Closson*, 138 Mass. 49. Whatever may be true of contracts between husband and wife made in or when they are domiciled in other jurisdictions, so far as personal property or personal liability is concerned, I think that contracts affecting the title to real property situate within the Commonwealth should be such as are authorized by our laws. I am of opinion that the bill should be dismissed.

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